THE

LAW OF COSTS, &c.

IN

CIVIL ACTIONS

AND

CRIMINAL PROCEEDINGS.

BY Sir JOHN HULLOCK, ESQ.

OF GRAY'S-INN, BARRISTER AT LAW.

WITH

AN APPENDIX,

CONTAINING

THE CASES TO HILARY TERM, 1796, INCLUSIVE.

Si esset ista cognitio juris magna ac difficilis, tamen utilitatis magnitudo deberet homines ad suscipiendum discendi laborem impellere.

CIC. DE ORAT.

8.

LONDON:

PRINTED FOR W. CLARKE AND SON, PORTUGAL-STREET, LINCOLN'S-INN.

1796.

UK
997.5
HUL

Tx
H914

Rec. May 4, 1891

PREFACE.

THE many interesting decisions which have, recently, occurred upon the Law of Costs, and the obvious importance of an intimate knowledge of that subject, preclude the necessity of offering any apology to the Profession, for laying before it the following sheets.

IT has been the object of the author to form a complete Collection of all the Cases, whether ancient or modern, dispersed in the works of our various reporters, which relate to this branch of the law; —these Cases he has endeavoured to arrange and exhibit under such heads, and in such order, as, in his opinion, were best calculated to facilitate the researches of the Lawyer, and to convey instruction to the Student.

IN stating the judgments of the courts, he has almost invariably adopted the language of the reporters themselves; and has, likewise, where he conceived it would at all elucidate the question, inserted a short abstract of the most material parts of the arguments urged by the counsel at the bar. On this account, he may, perhaps, in the opinion

of some, have subjected himself to the imputation of useless prolixity. But he apprehended that this mode of illustrating the subject was essentially necessary to the attainment of his grand object—*general* utility. For the use of those gentlemen who move in the higher ranks of the profession, and must, therefore, unavoidably possess a comprehensive library, a more concise statement of the authorities, might probably have been amply sufficient: but to that part of the profession upon whom neither situation nor duty has imposed the necessity of consulting, nor, consequently, of possessing many legal authors, a faithful transcript of the arguments and opinions of the judges and courts, and, in some instances, of what was offered at the bar, may be not only acceptable, but necessary; being, perhaps, the only mean by which a treatise upon a detached head of the law, can be to them of any *real* advantage. And this method, it is presumed, may not prove altogether useless even to the barrister, by exhibiting, in one point of view, what otherwise could only be obtained by consulting a number of different, and often widely scattered, authorities.

Gray's-Inn Square,
Nov. 15th, 1792.

CONTENTS.

CHAP. I.

PAGE

Of a Plaintiff's Right to Costs - 2

CHAP. II.

Of a Defendant's Right to Costs - 124

CHAP. III.

Of Costs, in Actions prosecuted, or defended, in particular Rights, or Capacities 173

CHAP. IV.

Of Costs, in particular Actions, and Proceedings - - 263

CHAP. V.

Of Costs, upon Amendments; Repleaders; bringing Money into Court; and upon a Verdict or Judgment, as to Part only, for the Plaintiff - - 344

CHAP. VI.

Of Costs, where a new Trial is granted; for not proceeding to Trial,—or to execute a Writ of Inquiry,—in due Time, or pursuant to Notice; where a Cause is referred to Arbitration, or goes off without being tried - - - 382

PAGE

CHAP. VII.

Of the Costs of a Special Jury, and of Witnesses - - - 433

CHAP. VIII.

Of staying Proceedings in a Suit,—till Security given for the Costs;—till the Costs of a former Action for the same Cause are paid;—and of deducting the Costs of one Action from those of another - 438

CHAP. IX.

In what Cases, there shall be double or treble Costs - - 475

CHAP. X.

Of the Liability of an Attorney to pay Costs; of taxing, and of his Lien on Deeds, &c. for his Bill - - 482

CHAP. XI.

Of Costs, in criminal Prosecutions and Proceedings - - 524

CHAP. XII.

Of Costs, upon superseding, or reversing an Outlawry - - - 591

CHAP. XIII.

Containing other Cases, and general Matters, relating to Costs - - 596

A TABLE OF THE NAMES OF THE CASES.

A

Absor v. French, 85
Adlame v. Colebatch, 594
Ailways v. Burrows, 165
Aland, Sir John Fortescue, v. Mason, 352
Alcock v. Andrews, 234
Allen v. Maxey, 131
Allington v. Vavasor, 138
Alsop v. Cleydon, 126
Ancell v. Slowman, 215
Anderson v. Buckton, 81
Anderson v. George, 387
Angell v. Smith, 220
Aplin v. Constable, 131
Appleton v. Smith, 69
Arden v. Lamley, 484
Arnold v. Thomson, 60. 81
Ashley, v. Stockwell, 593
Ashton, v. Molyneaux, 504
Aslin, v. Parkin, 440
Asser v. Finch, 85. 87
Astley, Bart. v. Young, 152. 375
Atkinson v. Burton, 486
Atkinson v. Jackson, 58
Attorney General v. Munn, 255
Audley v. Wells, 254
Austen v. Pigot, 311
Aylett v. Harford, 609

B

Bagshaw (lessee of Wynne) v. Bishop of Bangor, 343
Baillie v. Cazalet, 362
Bailly v. Wilkinson, 405
Baker v. Hearne, 36
Baldry v. Packard, 600
Baldwin v. Morgan, 607
Baldwin v. Tankard, 257
Baldwyn v. Richards, 464
Bargrave v. Atkins, 419
Barker v. Butler, 488
Barker v. Bishop of London, 510
Barker v. Tibson, 423
Barlow v. Flint, 420
Barnard v. Moss, 300
Barnes v. Edgard, 74
Barming v. Fryer, 599
Bartlett v. Robins, 27
Bartlett v. Spooner, 122
Barton v. Miles, 241
Bass v. Firmen, 455
Bass v. Hickford, 33
Batchelor v. Bigg, 47
Bate v. Crane, 356. 363
Bateman v. Wallis, 480
Battie v. Brown, 406
Baynham v. Matthews, 193
Beale v. Beale, 418
Beale v. Moor, 85. 87
Bearcroft, *ex parte*, 507
Beck v. Nichols, 49. 67
Bellew v. Aylmer, 303
Bennett v. Sydenham, 595
Bennett v. Coker, 190. 194
Bennet v. Hart, 500
Bennett v. Snell, 311
Bennett v. Talbois, 91, 92, 93, 97
Benn (lessee of Mortimer) v. Denn, 453

Benson v. Hemming, 161
Bentley v. Scott, 277
Bettinson v. Hinchman, 321
Bilota v. Pointell, 475
Birch v. Daffey, 67
Birchman v. Wright, 439
Bird v. Smith, 193. 467
Bishop v. Huggins, 514
Blachley v. Fry, 67. 75
Blackboyne v. Packer, 73
Blandford v. Foote, 609
Blizard v. Barnes, 33
Blood v. Lee, 218
Blunt v. Mither, 68
Blunt v. Morris, 348
Blythe v. Topham, 127
Boiture v. Woolrick, 48
Boocher v. Rogers, 310
Boseville v. ———, 512
Bowton v. Nicholls, 281
Bracher v. Cotton, 420
Brampton v. Crabb, 158, 480
Brickenden's (Doctor) case, 600
Brickwood v. Fanshaw, 496
Bridges v. Raymond, 371
Bright v. Jackson, 114
Britton (lessee of Webb) v. Greenville, 216
Broadbent v. Wilkes, 597
Brookes v. Hague, 495
Brooks v. Mason, 497
Brockhurst v. Copson, 383
Brown v. Crashaw, 309
Browne v. Gibbons, 32
Brown v. Johnson, 386
Brown v. Marsden, 420
Brown v. Taylor, 44. 61
Bucktram v. Dennet, 542
Bull v. Palmer, 176
Burchall v. Bellamy, 429
Burry v. Perry, 34
Bury v. Cross, 317
Butcher v. Green, 374
Butler v. Cozens, 66
Butler v. Grubb, 162. 426
Butler v. Inneys, 215
Byron's (Lord) case, 455

C

Cameron v. Reynolds, 128
Carlisle v. Meyrick, 317
Carpenter v. Joynes, 419
Carr v. Sharp, 460
Carruthers v. Lamb, 54. 60
Carter v. Fish, 33
Caswell v. Norman, 287
Catherol v. Cooper, 241
Cave v. Aaron, 485
Crufee v. Berrie, 598
Chamberlain v. Hewetson, 598
Chapman v. Brown, 456
Chapple v. Chapman, 505
Christmas v. Chase, 505
Clarke v. Godfrey, 497
Clarke v. Gorrill, 405
Clarke v. Othery, 49
Clarke v. Taylor, 500
Clarke v. Stone, 498
Claxton v. Laws, 44
Clegg v. Molyneux, 65. 77 (n). 78
Cobb v. Hunt, 313
Cockerill v. Allanson, 86. 88 (n)
Cockerill v. Kynaston, 184
Colethurst v. Hayes, 72
Collier v. Guillard, 37
Collins v. Morgan, 259
Colton v. Perks, 359
Congley v. Hall, 310
Coningsby's (Lord) case, 445
Cooke v. Dobree, 467
Cooke v. Sayer, 119. 151
Cooper v. Robins, 293
Cooper v. Tiffin, 141
Cowper v. Milburn, 499
Cotteril v. Tolly, 54. 56. 60
Cox v. Chubb, 465
Craven v. Billingsley, 486
Creake v. Pitcairn, 313, 315, 321
Cremer v. Dent, 114, 122
Cromwell v. Grumsden, 351
Crutchfield v. Scott, 187
Cumings v. Sibly, 209
Cusack v. Jones, 439
Cutler v. Goodwin, 381

D

Dacre (Lord) v. Tebb, 71
Dale v. Robinson, 594

Daly v. Bellamy, 130
Dand v. Sexton, 29
Darlow v. Collison, 136
Davies v. James, 131
Davies v. Mansell, 356
Davila v. Herring, 134. 397
Dawson *and* Clerk, 235
Day v. Hanks, 376
Dayrell v. Briggs, 122
Dearne v. Grimp, 197
Dence v. Doble, 452
Denny v. Wigg, 35
Denton v. Parsons, 274
Denn (lessee of Lucas) v. Fulford, 439
Devenish v. Martin, 139. 249
Dibben v. Cooke, 143
Dickenson v. Pearson, 101
Dixie, Bart. v. Somerfield, 68
Dixon v. Plant, 598
Dodd v. Joddrel, 111, 115
Doe (lessee of Selby) v. Alston, 440
Doe (lessee of Chadwick) v. Law, 448
Doe (lessee of Chambers) v. Law, 450
Doe (lessee of Dutchess of Hamilton) v. Hatherley, 450
Doe v. Law, 452
Done v. Knott, 130
Dover v. Robinson, 39
Dover (town of) v. Hodgson, 208
Downes v. Shaft, 183
Draper's Company, v. Davis, 501
Duberley v. Page, 106. 109
Dublin (Archbishop of) v. Dublin (Dean of) 290
Dudley v. Nettlefold, 418
Duell v. Stow, 409
Durrant v. Kerr, 422
Duthy v. Tito, 467
Dutton v. Agate, 511

E

Eardley v. Turnock, 281
Eaves v. Mocato, 179
Eccleston v. Clipsam, 193
Ecollier v. Dutour, 510
Edie and Laird v. East India Company, 385
Eggleston v. Smart, 276
Elde v. Stephens, 207
Ellison v. Kirby, 505
Englefield v. Round, 224
English v. Cox, 457
Entick v. Carrington, 234
Evans v. Bevis, 504
Evely v. Livermore, 496

F

Facy v. Lange, 323
Farewell, v. Coker, 522
Farnell v. Keightly, 276
Farworth v. Smith, 598
Fawcett v. Rowles, 362
Feltham v. Terry, 236
Ferguson, Bart. v. Mackreth, 485
Ferguson v. Rawlinson, 284
Fisher v. Kitchingman, 129
Fitzgerald v. Whitmore, 442
Fitzpatrick v. Pickering, 161
Foot v. Berkley, 281
Ford v. Miles, 467
Ford v. Parr, 105
Fowke v. Horabin, 482
Foy v. Lister, 309. 314
Franklin v. Jolland, 76
Frederick, Bart. v. Lookup, 209
Furnis v. Hallom, 418, 419
Fyson v. Cooke, 353

G

Gale v. Till, 286
Gardiner v. Holt, 224
Gardiner v. Merrott, 352
Gardner v. Jessop, 166
Garland v. Burton, 203
Garland v. Extend, 149
Geale v. Chapman, 135
Gegge v. Jones, 324
Ginger v. Cowper, 292
Gippe's case, 310
Golding v. Grace, 603,4
Good's case, 621

Goodright v. Hoblyn, 410
Goodright v. Holton, 617
Goodright (lessee of Jones) v. Thrustout, 440
Goodright (lessee of Larmer) v. Searle, 439
Goodright v. Tregurtha, 616
Goodtitle (lessee of Clewlow) v. Low, 467
Goodtitle v. Mayo, 214
Goose, v. Penton, 621
Gould v. Coulthurst, 292
Graham v. Benton, 609
Grandy v. Wiltshire, 82
Granville v. Vincent, 82
Grave v. Grave, 222
Gravenor v. Cape, 457
Graves v. Short, 284
Green v. Cole, 622
Green v. Hassell, 506
Greenhill v. Shepherd, 131
Greenhow v. Isley, 108, 110
Greetham v. the Hundred of Theale, 13, 14. 130
Gregg's case, 187. 504
Gregory v. Dormer, 67
Grindley v. Holloway, 238
Griffin v. Eyles, 516
Griffith v. Squire, 499, 505
Griffiths v. Williams, 357
Gross v. Fisher, 159
Grymston v. Reyner, 623
Grumble v. Bodilly, 453
Gulliver v. Drinkwater, 615
Gundry v. Feltham, 91
Gundry v. Sturt, 379
Guy v. Wilkinson, 404
Gynn v. Kerby, 487

H

Hacker v. Newburn, 455
Haines v. Hughes, 80
Hale v. Cove, 384
Hall's case, 599
Hampson v. Adshead, 54, 55, 56. 60
Hamp v. Cuming, 404, 405
Hammond v. Woolmer, 619
Hand v. Lady Dineley, 364
Hanson v. Liversedge, 418
Hankey v. Smith, 397
Hazeltine v. Kirkhouse, 66
Harper v. Leech, 498
Harper v. Sherrard, 480
Harper v. Jiffer, 73
Harris v. Jones, 194
Harrison v. Dublin (Archbishop of) 290
Hartley v. Bateson, 356
Harward v. Furborne, 135
Haselop v. Chaplin, 272
Hawes v. Saunders, 195
Hayes v. Thornton, 620
Haynes v. Guy, 621
Heaward v. Hopkins, 160
Helyer's case, 237
Henslow v. Bishop of Salisbury, 283
Henderson v. Rumbold, 374
Herbert v. Williamson, 333
Herring v. Finch, 236
Hester v. Hall, 140. 410. 436
Hickman v. Colley, 158
Hickman v. Goring, 239
Higgins v. Jennings, 67. 85. 87
Highman v. Hassell, 425
Hill v. Wilkes, 594
Hill v. Reeves, 66
Hillier v. James, 505
Holdfast (lessee of Hattersley) v. Jackson, 449
Holland v. Gore, 30
Holman v. Brazier, 594
Holsey v. Mullins, 467
Holmes (lessee of Brown) v. Brown, 605
Hooper v. Till, 503
Hopkins v. Neal, 224
Hoskins v. Lord Berkley, 334. 336. n. (1)
Houghton v. Starkey, 316
Howard v. Cheshire, 27. 30. 107. 112
Howard v. Jemmet, 196
Howard v. Radburn, 189, 407
Huer v. Whitebread, 303
Hugh v. Lloyd, 195
Hunt v. Robinson, 241
Hurst v. Dixon, 510
Hussey v. Jordan, 167
Hutton v. Barnes, 314
Hyde v. Hallagan, 291

I

Jackson v. Inhabitants of Calesworth, 15
Jackson v. Duchaire, 385
Jackson v. Hassell, 606
Jacob v. Miles, 623
James v. Hatfield, 224
James v. Tintney, 273
Ibbeson v. Brown, 45
Ibbotson v. Brown, 89
Jennings v. Wilson, 400
Jenkins v. Plume, 180
Jenkinson (Thrustout on demise of,) v. Woodyear, 146
Jenster v. Saunders, 181
Jeynes v. Stephenson, 207
Ifield v. Weeks, 408
Ilatt v. Lisset, 130
Ingle v. Wordsworth, 144
Johnson v. Houlditch, 360
Jones v. Wilson, 182
Jones v. Davies and Wife, 107
Jones v. Concannon, 276
Jones v. Stephenson, 404, 5
Jordan v. Harper, 135
Jordan v. Powell, 496

K.

Kabell v. Hudson, 358. 366
Keen v. Whistler, 72
Keldridge's case, 203
Kempster v. Deacon, 84
Kercheval v. Smith, 237
The King v. Adams, 614
——— v. Bankes, Esq. 331
——— v. Boughey, 562 n. (1) 563 n. (1)
——— v. Boys, 558
——— v. Bradshaw, 550
——— v. Bray, 569
——— v. Brooke and others, 576
——— v. Bury, 514 (n)
——— v. Carpenter, 589
——— v. Charlesworth, 219
——— v. Inhabitants of Chelsea, 550
——— v. Inhabitants of Cheshunt, 551
——— v. Bishop of Chester, 332
The King v. Clarke, 221 (n)
——— Cox, Esq. 579
——— v. Robert Chamberlayne, 544
——— v. Davis, 574
——— v. Dore, 564
——— v. Downes, 584
——— v. Dunning, 585
——— v. Dyke, 550
——— v. Eaton, 564
——— v. Earl, 577
——— v. Edwards, 546
——— v. Eyres and Bond, 601
——— v. Inhabitants of Edgeworth, 569
——— v. Filewood and another, 575
——— v. Fielding, 488. 579
——— v. Fisher, 534
——— v. Fonseca, 529
——— v. Foxcroft, 340
——— v. French, 534
——— v. Gale, 548
——— v. Inhabitants of Great Chart, 568
——— v. Inhabitants of Glastonbury, 20
——— v. Goodman, 540
——— v. Gohaire, 578
——— v. Goter, 536 n (1)
——— v. Griffith, 336
——— v. Haddock, 550
——— v. the Town of Hartford, 582
——— v. Inhabitants of Hermitage, 20
——— v. Heydon, 576
——— v. Hitcham, 569
——— v. Howell, 583
——— v. Jenkinson, 570
——— v. Ingleton, 533
——— v. Ireland, 539
——— v. Lewis, 590
——— v. Lowfield, 546
——— v. Lyon, 531
——— v. Inhabitants of Madley, 568
——— v. May, 614
——— v. Midlam, 134. 565
——— v. Moor, 548
——— v. Morgan, 221. (n) 578. 583

The King v. Nicholls, 338
——— v. Osborne, 539
——— v. Palmer and Baine, Esq. 579
——— v. Pearson, 221 (n)
——— v. Pickerill, 588
King v. Pippet, 407
The King v. Poland, 479
——— v. Philips, 336. 348
——— v. Plunket, Esq. 607
——— v. Powell, 584.
——— v. Reynolds, 221 (n)
——— v. Righton, 547
——— v. Rossiter, 546
——— v. Sharpness, 534
——— v. Sidney, 529
——— v. Smith, 537
——— v. Mayor of Stafford, 401
——— v. Stokes, 540
——— v. Strong, 534
——— v. Tew, 549
——— v. Wardroper, 590
——— v. Warren, 550
——— v. Wallace, 538
——— v. Williams, 586
——— v. Wingfield, 551
——— v. Woodfall, 574
——— v. Wroughton, Esq. 579
Kirk v. Nowill, 118
Knight v. the Duchess of Hamilton, 187
Knightley v. Buxton, 74
Knock v. Wilkins, 456

L

Ladd v. Wright, 126, 127
Laiston's case, 129. 131
Lamb v. Goodenough, 484
Lampen v. Hatch, 39
Lamley v. Nicholls, 195
Lane v. Brown, 66
Langdon v. Vinicombe, 381
Langley v. Blackerby, 217
Langley v. Stapleton, 514
Lately v. Fry, 53. 67
Laver v. Hobbs, 67
Law v. Worral, 204
Lawe v. Harwood, 32
Lawson v. Story, 477. 481
Lawress (hundred of) v. Shipman, 601
Lazarus v. Pritchard, 456
Lee v. Knight, 505
Legge v. Richards, 286
Leehill v. Reynell, 347
Lewis v. Piercy, 608
Lewis v. Whitton, 600
Leicester (Earl of) v. Wooden, 403, 4
Linfield v. Ferne, 419
Littlewood v. Smith, 38
Lloyd v. Day, 89. 122
Lloyd v. Winton, 276
Lock v. Shermer, 369
Longford v. Ellis, 609

M

Macdonald v. Gunter, 484
Mackworth v. Shipward, 272
Maddox v. Paston, 363
Malton v. Acklam, 308. 321
Manby v. Wortley, 406
Manners v. Pern, 596
Marder v. Cox, 422
Marriner v. Barret, 145
Marrow v. Billam, 496
Marsh v. Jennedy, 180 n. (1)
Marsh v. Yellowley, 183
Marsh v. Carter, 500
Martin v. Norfolk, 188
Martin v. Winder, 499
Martin v. Townsend and Sawbridge, 602
Mason v. Jackson, 183
Mason v. Skurray, 395
Maughen v. Graham, 593
Mears v. Greenaway, 58
Melchart v. executors of Halsey, 459
Merril v. Jocelyn, 368
Mewburn v. Langley, 407
Middleton v. Croft, 318
Milburn v. Read, 42, 48. 50. 103
Miller v. Seagrave, 150
Milner v. Crowdall, 496
Milton v. Terril, 405
Milward v. Sterling, 224
Mitchell v. Oldfield, 473. 518
Mitchell v. Gibbons, 606
Mitchel v. Soaper, 66
Mitchell v. Younghusband, 33

Modeley v. York, 179
Money v. Leach, 235
Montgomery's (Lord) case, 393
Montpesson v. Randle, 386
Moorhouse v. Barham, 504
Mordecai v. Nutting, 146
Mordecai v. Solomon, 487
Morgan v. Crompton, 224
Moulton v. Bingham, 463
Munford v. Pait, 212
Murray v. Wilson, 135

N

Newman v. Goodman, 404. 407
Nicholas v. Chapman, 352
Nicholson v. Croft, 613
Nicolas v. Killigrew, 177
Noble v. Lancaster, 354
Norris v. Waldron, 372
Nott v. Long, 414
Nunez v. Modigliani, 192. 470
Nutkins v. Wilkin, 606
Nutting v. Jackson, 235

O

Oats v. Holiday, 218
O'Connor v. Murphy, 472
Ogle v. Moffat, 190
Okeley v. Salter, 232
Oldknow v. Wainwright, 340
Orion v. Mee, 490
Orton v. Vincent, 606
Orpwood v. Holden, 72
Osbaldeston v. Cross, 512
Ouston v. O'Bryan, 515

P

Page v. Kirk, 45
Page v. Creed, 63
Pallant v. Roll, 99
Palmer v. Williams, 333
Palmer v. Warner, 600
Palmey v. Swan, 501
Parke v. Davis, 73
Parker v. Wells, 395
Parquot v. Elling, 443
Parry v. Owen, 512
Peacock v. Steer, 175
Peak v. ——— 47
Pembroke (Earl of) v. Westall, 44
Pembroke (Earl of) v. Bostock, 282
Pemple v. Tinsley, 207
Pendock, v. Johnson, 445
Pennel v. Wallis, 157
Penruddock v. Clerk, 283
Penruddock v. Errington, 281. 607
Perry v. Nicholson, 418
Peterken v. Sampson, 606
Phelps v. Winchcomb, 234
Philips v. Fish, 33
Philpot v. Jones, 89
Pie's case, 202
Pike v. Corbin, 440
Pilfold's case, 6. 8. 11. 620
Pinkney v. Inhabitants of East Hundred, 10
Pitts v. Carpenter, 159
Place v. Twyford, 347
Player v. Bandy, 596
Pocklington v. Peck, 304
Poole v. Broadfield, 304
Poole v. Boulton, 145
Poole v. Gardner, 310
Porrier v. Carter, 444
Porter v. Gray, 271
Porter v. Harris, 380
Porter v. Sterling, 496
Portman v. Came, 181
Porzelius v. Maddocks, 407
Potts v. Voyce, 594
Powel v. Smith, 467
Pratt v. Salt, 421
Pray v. Edie, 442
Preston v. Lingen, 441
De la Preuve v. Duc de Biron, 443
Price (lessee of Cuthbert) v. Birt, 429
Price *ex parte*, 515
Price v. Foulkes, 138
Pym v. Warren, 139

Q

The Queen v. Corporation of Bewdley, 389
The Queen v. Collins, 392
——— v. Clark, 392. 579
——— v. Danvers, 146. 593

The Queen v. Ewer, 530
——— v. Goodenough, 528
——— v. Summers, 538

R

Raban v. Plaistow, 602
Rann v. Pickins, 239
Ratcliffe v. Eden and others, 9
Ratcliffe v. Burton, 292
Rathbone v. Stedman, 363
Reading v. Grafton, 412
Read v. Grappler, 130
Real v. Macky, 444. 456
Reeves v. Butler, 82
Rejindoz v. Randolph, 292
Rennalls v. Cooper, 257
Reynolds v. Osborn, 66
Reynolls v. Hayes, 310
Richards v. Turner, 62
Richardson v. Martin, 504
Ridge v. Irton, 351
Right (lessee of Cuzack) v. Wrong, 442
Ritson v. Francis, 607
Roberts v. Biggs, 468
Roberts v. Cook, 453
Roberts v. Holywell, 33
Roberts v. Mackoul, 468
Robson's case, 309
Roe v. Dunning, 407
Roe (lessee of Wood) v. Doe, 413
Rollston v. Chambers, 481
Roper v. Harrison, 224
Rossiter v. Bolting, 73
Rouse v. Bardin, 397
Russell v. The Men of Devon, 16

S

Sadler v. Evans, 430
Saltern v. Wynne, 286. 370
Samuel v. Hoder, 271
Sands v. Child, 475. 481
Savage v. West, 606
Savage v. Franklin, 356
Scarrall v. Horton, 364
Scatchmer v. Foulkard, 220
Schoole v. Noble, 147. 517
Scoffin v. Robinson, 468
Scott v. Perry, 140
Schulbred v. Nutt, 395
Seabroke v. Howkin, 594
Seed v. Wolfenden, 323
Senhouse v. Barnes, 435
Shadow v. Painter, 93
Sharp v. Hobart, 309
Sheldon v. Ludgate, 45
Shepherd v. Brand, 418
Shepherd v. Yard, 66
Shindler v. Roberts, 445
Shipton v. Newman, 256
Short v. King, 446
Silk v. Bennett, 166
Sisney v. Nevinson, 369
Slaughter v. Talbot, 223, 4
Sloman v. Aynell, 218
Skinner's case, 308
Smith v. Betterton, 72
Smith v. Clarke, 79
Smith v. Dunce, 475. 481
Smith v. Faldo, 607
Smith v. Gregg, 404, 5
Smith v. Neesam, 46
Smith v. Hanmer, 303
Smith v. Smith, 285
Smith v. Wallis, 478
Smith v. Walker, 275
Smith (lessee of Ginger) v. Barnardiston, 447
Smith, *ex parte*, 489
Smith v. Woodcock, 603
Smyth v. Lydcott, 460
Smithsend v. Long, 66
Sneaps, *ex parte*, 610
Southmead v. Northmore, 424
Sparrow v. Turner, 429
Spieres v. Frederick, 205
Spink v. Hare, 498
Stephenson v. Browning, 418
Stephenson v. Taylor, 499
Stevenson v. Yorke, 358
Stenden (lessee of Wheatly) v. Hall, 428
Stiddar v. Tylar, 309
Stodart v. Johnson, 358
Stone v. Forsyth, 117
Stone v. Lingar, 236
Stores v. Tong, 623
Strong v. Harwood, 410
Stroud v. Hoskins, 310

Styleman v. Patrick, 70
Styles v. Cox, Bart. 234
Sullivan v. Montague, 257
Surman v. Shelleto, 36
Sutton v. Mitchell, 383
Swetnam v. Archer, 317
Swinglehurst v. Altham, 424

T

Talbot, *ex parte*, 610. *marg.*
Tanner v. Small, 313
Taylor v. Barebone, 182
Taylor v. Blair, 169
Taylor v. Bramble, 347
Taylor v. Lowe, 217
Tempest v. Metcalf, 349
Theedam v. Morris, 411
Thelusson v. Staples, 436
Thomas v. Gyfford, 310
Thomas v. Lloyd, 149
Thomas v. Powell, 337
Thomson v. Berry, 51, 52. 60. 81
Thornby v. Fleetwood, 289. 619
Thrale v. Bishop of London, 151
Thrustout v. Bedwell, 617
Thrustout (lessee of Barnes) v. Craster, 469
Thrustout v. Foot, 617
Thrustout (lessee of Parke) v. Troublesome, 446
Thrustout (lessee of Turner) v. Grey, 440
Thoroughgood v. Scroggs, 481
Tiffin v. Glass, 36
Tilt v. Bartlet, 597
Tite v. Bishop of Worcester, 350
Timmonds v. Marson, 383,4
Todd, *ex parte*, 610
Topsall v. Edwards, 33
Townley v. Steele, 175
Tredway v. Herbert, 452
Trelawney v. Thomas, 396
Trelawney v. Babb, 481
Tross v. Michell, 603
Turner v. Barnaby, 616
Turner v. Gallilee, 142. n. (1)
Turner v. Turner, 222
Turner v. Horton, 35
Turwin v. Gibson, 315
Tye v. Saunders, 260
Tyne v. Every, 419

V

Valentine v. Hawkins, 486
Vane v. Mechell, 356
Venn v. Philips, 51, 52, 72
Vile v. Daw, 405
Vincent v. Strode, 480

W

Walker's case, 61
Walker v. Carter, 606
Walker v. Egerton, 241. 479
Walker v. King, 200
Walker v. Packer, 217
Walker v. Robinson, 24
Waldron's case, 522
Waldron v. Norris, 604
Wallis v. Lewis, 179
Walter v. Packer, 411
Ward v. Snell, 17. 623
Wareing v. Potter, 411
Wase v. Wyburd, 167
Washer v. Smith, 63
Watkinson v. Swyer, 45
Watkinson v. Pacey, 314
Watson v. Jackson, 399
Watts's case, 599
Weller v. Goyton, 402
Welland v. Rock, 498
Welch v. Hole, 519
Wenpenny's case, 234
Weston v. Donelly, 159
Weston v. Poole, 511
Weston v. Withers, 214. 465
White v. Smith, 24
White v. Washington, 483
White v. Woodhouse, 355
Whitall v. White, 592
Wickham v. Walker, 101
Wigan v. Holmes, 401
Wiggon v. Arscot, 313
Williams, *ex parte*, 506,7
Williams v. Frith, 502
Williams v. Riley, 287
Williams v. Attorney General, 342

Willet v. Tidey, 238
Wills v. Crabb, 605
Wills v. Turner, 316
Wiltshire v. Lloyd, 165
Wilkinson v. Poole, 412
Wilkinson v. Allott, 14. 206
Wilkinson v. Meyer, 352
Willoughby v. Rhodes, 606
Wilson v. Foote, 619
Winnard v. Foster, 275
Winter v. Slow, 213
Winter v. Garlick, 418
Windsor's (Lady) case, 430
Winne v. Lloyd, 285
Witham v. Hill and others, 9
Wood v. Johnson, 200
Woodgate v. Knatchbull, 624. n. (1)
Woodhouse v. Bidwell, 34
Woodward v. Bugg, 313
Woolley v. Cloutman, 163
Wortley v. Rayner, 598
Wyvil v. Stapleton, 294

Y

Yates v. Carlisle, 611
Yates v. Gun, 152, 378

CHAPTER I.

OF A PLAINTIFF'S RIGHT TO COSTS.

SECT. I.

Of a Plaintiff's Right to Costs under the Statute of Gloucester, 6. Edw. 1. c. 1.

SECT. II.

Where there shall be no more Costs than Damages, when the latter are found under Forty Shillings.

1. *In Personal Actions under the 43 Eliz. c. 6. s. 2.*
2. *In Actions of Slander.*

SECT. III.

Where there shall be full Costs, although the Damages recovered are under Forty Shillings, and where not.

1. *In Actions of Assault and Battery.*
2. *In Actions of Trespass, under the 22 & 23 Car. 2. c. 9.*
3. *In Actions for Trespasses committed by inferior Tradesmen, &c. in Hunting, &c.*
4. *In Actions for wilful and malicious Trespasses.*

SECT. IV.

Of Costs, where a Defendant in any Action, or a Plaintiff in Replevin, has leave to plead several Matters.

CHAP. I.

Of a Plaintiff's Right to Costs.

SECT. I.

Of a Plaintiff's Right to Costs under the Statute of Gloucester, 6 Edw. 1. c. 1.

2 Inst. 288. BEFORE the statute of *Gloucester*, no person was entitled to recover any costs of suit either in plea real, personal, or mixed: but, by the common law, if the plaintiff failed in his action, he was amerced *pro falso clamore*; if he succeeded, the defendant was *in misericordiâ* for his unjust detention of the plaintiff's right, but was not liable to the payment of any costs of suit, at least under that title.

Gilb. H. C. P. 260. 265.
3 Bl. Com. 399.
Jenk. 161. pl. 7.

2 Inst. 109. 112. THIS doctrine prevailed universally as to plaintiffs, and with only one exception as to defendants. The statute of *Marlberge*, 52 Hen. 3. c. 6. in one instance, entitled a defendant to costs of suit. Previous to that statute, a practice of enfeoffing their eldest sons and heirs, being within age, of their heritage, was very common among the tenants by knight's-service. This device was adopted with a view to defraud the lord of the fee of his wardship; for, since, by the common law, the heir could not be in ward, unless he

were in by descent, if, after making a feoffment as abovementioned, the tenant had died, his son, the feoffee, being still within age, the latter could not have been in ward, because he would not have been in by descent, but under the feoffment. To defeat such *fraudulent* feoffments, a writ of right of ward was given to the lord by the lastmentioned statute; which, at the same time, further provided, that, if any such feoffee should be impleaded, and the feoffment should be found to have been made *bonâ fide*, in such case, he should have his damages awarded, and his *costs* also. However, since the abolition of the ancient tenures by the 12 Car. 2. c. 24. this part of the statute of *Marlberge* is become obsolete.

But although costs were never given at common law, *eo nomine*, yet in reality they were always considered and included in the *quantum* of damages, in such actions where damages were given; and even now, costs for the plaintiff are always entered on the roll as increase of damages by the Court; the form of which entry may, possibly, have originated from the abovementioned practice. But as the jury must frequently have been very inadequate judges of the amount of the costs incurred by a plaintiff in his suit, the allowance for such costs, in their assessment of damages, must, as frequently, have been proportionably inadequate and defective. 3 Bl. Com. 399.

Indeed it is said by Lord *Chief Baron* Gilbert, in his History of the Court of Common Pleas, that the Justices in Eyre were wont at their *iters*, before the statute of *Gloucester*, to Gilb. H. C. P. 266.

assess the costs of the plaintiff, where he had prevailed, at a reasonable sum, exclusive of, and unblended with the damages which he had recovered; and that this custom continued until that part of our judicial polity, relative to the ancient *iters*, was superseded by the introduction of the modern justices of assize and *nisi prius*. At which time it is said to have become necessary that the costs should be taxed by the court above, and not by the judges upon their circuits.

But, as this allowance of costs, whether made by the judges at their *iters*, or by the court above, was a matter merely *ex gratiâ*, the legislature considered it to be more congenial to the nature of the law of *England*, that a plaintiff's right to costs should be established upon the basis of a positive act of parliament, than that it should depend upon the arbitrary discretion of a judge or court.

It is therefore provided by the statute of *Gloucester*, 6 Edw. 1. c. 1. that, "the demandant shall recover *damages* "in an assize of *novel disseisin*, in a writ of entry upon *no-* "*vel disseisin*, and in writs of *mortdauncestor*, *cozinage*, "*aiel*, and *bezaiel*;—and further, that the demandant may "recover against the tenant the costs of his *writ purchased*, "together with the damages abovesaid. And this act shall "hold place *in all cases* where the party is to recover *da-* "*mages*. And every person from henceforth shall be com- "pelled to render damages, where the land is recovered "against him upon his own intrusion, or his own act."

2 Inst. 288. The statute only makes mention of the costs of the *writ*,

but, by a liberal interpretation, it hath been extended to all the legal costs of a *suit*; however, the plaintiff is not to be allowed, in his costs, money expended on account of himself, or for the loss of his own time.

If a writ abate by the act of God, and the plaintiff purchase a new one by *journeis accounts*, he shall have the costs of the first writ and the proceedings thereon; otherwise it is, if the first writ abate, through the default of the plaintiff. 2 Inst. 288.

Thus where two bring an assize, and the one dies, by which the writ abates, and the other brings a new writ by *journeis accounts*, and recovers, he shall have the costs of the first suit. Yearb. 9 Ed. 4. 5. Br. Tit. Costs, pl. 15.

An almost infinite number of cases have been agitated upon the statute of *Gloucester*, wherein the only question appears to have been, whether the words "that the party shall "recover costs *in all cases*, where he is to recover damages," extend to give a plaintiff costs in a case, wherein damages have been *created* and *newly given* by a statute subsequent to that of *Gloucester*; or are restrained in their operation to those cases alone wherein damages were recoverable either *before*, or *by* that statute? The authorities are contradictory upon this point; the more ancient ones have been determined upon the latter, but, in a recent and solemn resolution, the Court of King's Bench appear to have adopted the former more liberal and equitable, rule of construction. I shall proceed to state the cases wherein the question has been debated.

10 Co. 116. a. 2 Inst. 289. March 29. 61. 1 Vent. 22. 1 Lill. Abr. 467. B. 3 Mall. Mod. Ent. 248.

IT is clearly settled that, where a statute, subsequent to that of *Gloucester*, increases the damages in a case, where *some* damages were recoverable at the common law, in an action on such statute, the plaintiff shall recover both the increased damages thereby given, and his costs of suit; and that, though no express mention be made of costs in the statute on which the action is grounded. Because, since the plaintiff would have at common law recovered some damages, in that species of action, he is entitled to costs under the statute of *Gloucester*.

Pilfold's case, 10 Co. 116. a. Gilb. C. P. 268. 1 Lill. Abr. 467. B. Barnes, 140. per Aston J. Cowp. 368.

BUT it is laid down in the books cited in the margin, that, where damages are *newly given* by a statute, subsequent to the statute of *Gloucester*, where *no damages were formerly recoverable*, the plaintiff, upon such statute, shall only recover the damages thereby given, and *no costs*, unless costs are expressly superadded by such new statute. Because, it is said, this is an act of *creation*, which creates and gives a compensation to the plaintiff, in a case wherein the common law afforded none before; and not attaching costs to a recovery thereon, none can be given, since the statute of *Gloucester* only operates to give costs in those actions where a plaintiff recovered damages at the common law, and in the cases specified in that statute.

H. 2. Eliz. Dyer, 177. b. 1 Ro. Abr. 516.

IN conformity with the above distinction, it hath been holden that the plaintiff cannot have costs in an action upon Stat. 1. & 2. P. & M. c. 12. to recover treble damages for driving a distress out of the hundred, because no such action lay before that statute, which does not annex costs to a recovery.

By the statute of Westminster 2. 13 Edw. 1. c. 5. s. 3. damages are given to the plaintiff in writs of *quare impedit*, and *darrein presentment* in two cases therein specified; but as, prior to this statute, no damages were recoverable in those *instances*, and as the statute does not mention costs, no costs are recoverable in any proceedings thereon.

Yearb. 2 H. 4. 17. b. 27. H. 6. 10. b. 10 Co. 116. a. 3 Malh. Mod. Ent. 144. 248. Barnes, 139. Sed Skin. 25. contra.

It is said that costs were recoverable in a *quare impedit*, at the common law, and that the reason why they are not still so in the cases where damages are given by the statute of Westminster the second, is, the great amount of those damages. But both this law and reasoning seem incorrect; it has been shewn that, at the common law, a plaintiff recovered costs in no one instance; and, as * *no damages* could be recovered in a *quare impedit* before the statute of Westminster 2, *no costs* could be recovered in any such case under the statute of *Gloucester*; and, on the other hand, if *some* damages might have been obtained in a *quare impedit* before the statute of Westm. 2, that act would have been *accumulative*, increasing the damages where some were before recoverable; and then, however large or exorbitant those damages might be, it is clear that costs would have followed a recovery.

Jenk. Cent. 281. 323. 4.

* 2 Inst. 289. 362. 6 Co. 51. a. 5 Co. 59. a. 1 Inst 17. b. 344. b. 3 Inst. 356. B. N. P. 128.

So in a *decies tantum* (*a*); in an action upon the statute of 5 Edw. 6. c. 14. against ingrossers (*b*); and in an action of attaint (*c*); it was holden that no costs should attend a recovery, because, in none of these cases, were any damages recoverable antecedent to, or by the statute of *Gloucester*.

(*a*) Yearb. 2 H. 4. 17. b. 27 H. 6. 10. b.
(*b*) 10 Co. 116. b. Stat. 5 Edw. 6. c. 14. rep. by 12 G. 3. c. 71.
(*c*) March 25. Cro. Car. 542.

2 Inst. 289. Yearb. 2 H. 4. 17. b. 9 H. 6. 66. b. Sed vide Yearb. 5 H. 5. 13. a. 5 H. 4. 7. a. Semb. cont. Vide etiam post.

So if an action of waste be brought against a tenant for life, or years, the plaintiff shall recover the place wasted, and damages, but no costs, because against such tenants, no action of waste could be maintained at common law, it being first given by the statute of *Gloucester*, c. 5. which gives damages, without mentioning costs.

2 Inst. 289. Vide post.

But if an action of waste be brought against a guardian or tenant in dower, there the plaintiff shall not only have damages upon the statute of *Gloucester*, c. 5. but likewise his costs; because against the lastmentioned tenants an action, or at least a writ of prohibition of waste, in which damages might have been recovered, lay at the common law; consequently, in such cases a plaintiff has a title to costs, if he recover, under the statute of *Gloucester*, c. 1.

10 Co. 116. b.

So in an action on the statute of 2 Hen. 4. c. 11. by a person for having been wrongfully impleaded in the Court of Admiralty, for a thing done upon land; and also in a writ of ravishment of ward, both damages and costs may be recovered, because damages might have been recovered in those respective cases antecedent to the statute of *Gloucester*, c. 1.

Ibid. ubi sup. Yearb. 27 H. 6. 10. b. acc.

The distinction taken, with respect to a plaintiff's right to costs, in the books above cited, between cases where damages are originally given by a statute subsequent to that of *Gloucester*, and those where damages might have been recovered at the common law, previous to that act (or, as they are commonly denominated, between acts of *creation*, and acts of *addition*), was recognized, as law, by three

judges of the Court of Common Pleas, in a modern decision, upon the riot act; but in that case, Lord *Chief Justice* WILLES was of a different opinion, and thought that the words of the statute of *Gloucester* furnished no ground for the distinction. And it is likewise observable, that Lord COKE himself, in his Second Institute, when commenting upon the words "*in all cases*," (the expression made use of in that act) lays down a rule inconsistent with that mentioned in his own report of *Pilfold*'s case; for says he,—"this clause doth extend "to give costs, where damages are given, to any demandant "or plaintiff, in any action by any statute made *after* this "parliament." 2 Inst. 289.

THE case in the Common Pleas, above alluded to, was an action founded on the 1 G. 1. stat. 2. c. 5. s. 6. to recover damages against the inhabitants of the Hundred, for the demolition of the plaintiff's houses, barns, &c. by rioters; in which he obtained a verdict, with damages, according to the statute. As costs are not annexed to a recovery, by the statute, the question before the court was, whether the plaintiff should have costs taxed *de incremento* by the prothonotary? Witham v. Hill and others, P. 32 G. 2. C. B. 2 Wils. 91. S. C. Barnes, 151. Ratcliffe v. Eden and others, M. 17. G. 3. B. R. Cowp. 485. S. P.

THE case was twice argued at the bar, and, after time taken to consider, the Court delivered their unanimous opinion, that the plaintiff was entitled to full costs.

LORD *Chief Justice* WILLES.—The plaintiff is entitled to costs, 1st, by the statute of *Gloucester*, 6 Edw. 1. c. 1. whereby it is provided, that the demandant may recover

against the tenant the costs of his writ purchased, together with his damages, "and this act shall hold place *in all cases* "where the party is to recover damages:" *in all cases* are very general words, and in my opinion extend to all actions at common law, and to all actions upon any former or * *latter* statutes, where *damages* are to be recovered.

* In the note of this case in *Barnes*, it is said that his lordship here cited a case of *Wilson* v. *Rawson*, determined in B. R. T. 21 G. 2. wherein the point was ruled conformably to this opinion; but Clive, *Justice*, said that no such case had ever before been mentioned to the Court.

2dly. THE word *damages* in this statute, 1 G. 1. c. 5. means costs of suit, as well as damages found by the jury; and this construction agrees with all the entries; for when *damna, misæ, et custagia* are all added together, the entries all conclude thus, "*Quæ quidem damna in toto se attin-* "*gunt*" to so much.

3dly. THE intent of the statute was to reimburse the party injured, and to give him an adequate satisfaction for the damages he hath sustained; but unless we were to adjudge him his costs of suit, he would not be reimbursed, as the statute intended he should be.

4thly. THE 1 G. 1. c. 5. as to this matter, is planned upon the statute 27 Eliz. c. 13. of *hue and cry*, and expressly directs the damages in the present case to be levied in the same manner, as is provided by the statute of Elizabeth, for reimbursing any party robbed; and although costs are not mentioned in the statute of Elizabeth, yet costs are always allowed in actions upon that statute. *Pinkney* v. Inhabitants of *East Hundred*, 2 Saund. 379. also another case in B. R. 21 G. 2. a copy of which record was now shewn in court, are in point.

PILFOLD's case seems to me an extraordinary case; however I do not over-rule it, but I think this case very different from it; here the plaintiff might have had an action against the particular persons who actually pulled down his houses and barns, and have recovered his damages and costs against them, at the common law, if they might have been known and found; and certainly the statute intended to give the party injured the same remedy against the Hundred, as he might have had against the trespassers themselves, if they could have been found and come at, which materially distinguishes this from *Pilfold*'s case. 10 Co. 116.

CLIVE, *Justice*.—I think the rule in *Pilfold*'s case is good law, which says, "that in all cases where a man either be-"fore, or by the statute of *Gloucester*, 6 Edw. 1. should "not recover damages, if after the said statute another sta-"tute, in a new case, give damages, there the plaintiff [un-"less costs are expressly given by such latter statute] shall "not recover costs:"—this I hold to be good law.

BUT what is the present case? The 1 G. 1. which we are now considering, does not create damages in a new case, for at common law, the particular trespassers would, in a case like the present, have been responsible for the damages; the statute has done nothing more than change the object against whom they are to be recovered. And therefore I am of the same opinion, that the plaintiff must have his costs.

BATHURST, *Justice*.—I am of the same opinion. It was objected for the defendants, that all the cases and precedents

for costs in *hue and cry* have passed *sub silentio*, but that is hardly possible; the same observation will equally hold hereafter in this case, for it will never appear upon the record that the question has been debated. The statute of *hue and cry* did not, in my opinion, create damages, but only gave the party robbed a different remedy from what he had before; for the party robbed, before those statutes, might have had an action against the Hundred for not keeping *watch* and *ward*.

THE statute 27 Eliz. c. 13. says, the inhabitants of the country shall be answerable for the robberies done, and the damages. This word *damages* here means costs, and the 1 G. 1. being planned upon it, I am clear that the plaintiff must have his costs. I think *Pilfold*'s case very good law, and am desirous it should not be shaken.

NOEL, *Justice*.—I am of the same opinion; the 1 G. 1. c. 5. is only auxiliary to the party, and not newly creating damages where there were none before. The prothonotary was ordered to tax the plaintiff his costs.

THE statute of 1 G. 1. c. 5. most certainly does not give damages in a new case; for, if it had never passed into a law, the trespassers would have been compellable to indemnify the party injured; the object and principle of the act was nothing more than to suppress the riots and tumults at that time prevalent in the kingdom, by transferring the damages, occasioned by the trespass, from the rioters to the Hundred; the offence was thereby made felony, but the party injured was meant

to remain in the same state as before;—the plaintiff therefore, in an action upon that statute, has an indisputable title to costs under the most rigid construction of the statute of *Gloucester*. That being the case, although the judges in *Witham* v. *Hill*, incidentally went into this matter, the question, whether the words of the statute of *Gloucester* are sufficiently comprehensive to include cases where damages have been newly given by a subsequent statute, was not immediately and *ex directo* before the Court. However, the construction of that statute contended for by Lord *Chief Justice* WILLES, is supported by two later decisions.

THUS in an action, by the party grieved, against the Hundred, on 9 Geo. 1. c. 22. s. 7. to recover damages for the malicious setting on fire a barn and outhouse, the plaintiff was nonsuited. The master, on an application to him by the defendants to tax the costs of the nonsuit, having a doubt whether they were entitled to them, a motion was made for the direction of the Court to the master, in this particular.

Greetham v. the Hundred of Theale. T. 5 G. 3. B. R. 3 Burr. 1723. B. N. P. 331. S. C. It is there said that the defendants had obtained a *verdict*, but that circumstance is immaterial, the right to costs being the same whether the defendant obtains a verdict, or the plaintiff be nonsuited.

ON behalf of the defendants, the statute 4 Jac. 1. c. 3. s. 2. was urged and relied on; the words are, "that if any person "shall sue in any court any action whatsoever, wherein the "plaintiff might have costs, in case judgment should be "given for him, the defendant shall have judgment to re-"cover costs against the plaintiff, if he be *nonsuited*, or a "verdict pass against him." And as in this case the plaintiff, if he had prevailed, would have *received* costs, he ought upon being nonsuited, to pay them.

And the Court—held that wherever the plaintiff would be entitled to costs, the defendant is so, reciprocally. Here the plaintiff, the party grieved, *would have been entitled*, therefore, as it is mutual and reciprocal, he is liable. And accordingly they directed the master *to tax the costs.*

PERHAPS the above case, independent of, and unsupported by any other resolution on the same point, would not be entitled to much regard, since its authority was considerably shaken by what was thrown out by Mr. *Justice* ASTON, in

Cowp. 367. *Wilkinson* v. *Allott*, M. 16 G. 3. B. R. where he took occasion to observe, speaking of the case of *Greetham* v. the Hundred of *Theale*, that "he would not have that case considered as a precedent, because the Court afterwards found "that they had mistaken and misapprehended the ground "upon which they determined it. The mistake upon which "the Court proceeded was, that the plaintiff being the party "grieved, would have been entitled to costs if he recovered; "and therefore, having failed, ought to pay costs to the defendant. But the fact was otherwise, for, as previous to "the 9 G. 1. c. 22. no damages were recoverable for what "is there made the subject of an action against the Hundred, "the plaintiff could not have had costs if he had succeeded "in his action upon that statute, it being a statute *subsequent* to that of *Gloucester*, which only gives costs where "damages were before recoverable; and consequently the "defendant was not entitled to any under the 4 *Jac.* 1. "c. 3."

HOWEVER, the principle adopted by the Court in the case

of *Greetham* v. the Hundred of *Theale*, has been recognized and confirmed in a very late decision; where, in an action grounded upon the statute of 9 G. 1. c. 22. for setting fire to the plaintiff's house, damages having been recovered to the amount of 191 l. the sole remaining dispute was concerning the plaintiff's title to costs.

Jackson v. the Inhabitants of Calesworth. M. 26 G. 3. B. R. 1 T. R. 71.

A RULE had been obtained, calling upon the defendants to shew cause why these costs should not be taxed; and on shewing cause, the matter was fully gone into and debated by the defendants' counsel; who contended, first, that no costs were due under this act. And, secondly, that, if the Court should be of opinion that any costs were due, the act of parliament having limited the sum to be recovered against the Hundred to two hundred pounds, and the damages here being one hundred and ninety one pounds, such costs and damages, taken together, should not exceed two hundred pounds in the whole.

WITHOUT hearing any argument for the plaintiff, WILLES, *Justice*, said, This point, on looking into the books, appears to have been determined. *Pilfold*'s case is the only one which bears the other way, which Lord *Chief Justice* WILLES seemed strongly inclined to over-rule in the case in *Wilson*. It has been the constant usage to give costs in actions on the statute of *hue and cry*. And wherever damages are given, costs ought to follow of course.

2. Wils. 92. ante 9.

BULLER, *Justice*.—Lord COKE, in his Second Institute, lays down a rule different from that in *Pilfold*'s case. And I doubt whether such an action against the Hundred as that

2 Inst. 289. ante 9.

Ante 12. mentioned by Mr. *Justice* BATHURST, has ever been brought. Rule absolute.

THE cause of action in the last case, namely, setting fire to the plaintiff's house, amounted to arson at the common law, and, therefore, the civil remedy being merged in the felony, he could not have recovered any damages before the passing of the statute 9 G. 1. c. 22. which gives him an action against the Hundred. Hence in deciding that the plaintiff is entitled to costs, on a recovery of damages, in an action upon that statute for *such* an offence (as perhaps, for *some* of the offences enumerated and made felony by that act, satisfaction in damages might have been recovered against the particular offenders, at the common law), although they, together with the damages recovered, should exceed the amount of the sum, beyond which the Hundred (by 9 G. 1. c. 22. s. 7.) is not made liable in damages, the Court have decided, that the statute of *Gloucester*, c. 1. extends to give costs to the party injured, in an action where no damages were recoverable before, or by that statute, but have been created by a subsequent one, and which subsequent statute gives damages, without mentioning costs. And, if it be true, as the Court seemed inclined to think in *Jackson* v. the Inhabitants of *Calesworth*, and as is expressly laid down by Lord KENYON, in the case of *Russell* v. the Men of *Devon*, that no action would have lain against the Hundred for not keeping watch and ward before the * statute, they not being a corporation, the determinations, giving costs to plaintiffs in (1) actions upon the statutes of hue and cry,

* The statute of Winton, 13 Edw. 1. stat. 2. c. 2. Vid. *Russell* v. the Men of *Devon*, 2 T.R. 672.

(1) By statute 8 G. 2. c. 16. s. 1. made for the amendment of the law relating to actions on the statute of hue and cry, the plaintiff is required

must have originated in the same rule of construction. And it seems highly probable, if the same question should ever again occur, that the court would acquiesce in a rule founded upon principles of reason and justice; particularly as the statute of *Gloucester* is a remedial act, and consequently ought to have a favourable interpretation.

Per Lord Loughborough Hen. Bl. 13.

It has been repeatedly decided, that, in an action of debt upon any statute, by a *party grieved*, for a *certain* penalty, the plaintiff shall not only recover the penalty or sum given by such statute, but also his costs of suit, although no costs are annexed to a recovery by the act of parliament on which the action is grounded. For here the penalty is a debt vested in the party grieved as soon as the offence prohibited is committed, and the action is similar to that upon a bond to recover a debt already due; and as in that case, so in this, the plaintiff is entitled to recover damages for the detention of the debt and costs also, by virtue of the statute of *Gloucester*.

2 Keb. 781. 1 Ro. Abr. 516. pl. 5. 574. pl. 1. Cro. Car. 559. March 57. 61. Jones, 447. Salk. 206. 12 Mod. 46. Cas. Pr. C. P. 87. Skin. 363. 367. Holt, 172. Comb. 224. 449. Carth. 230. 1 Ld. Raym. 172. Co. Ent. 163. b. 164. b. 1 Lill. Abr. 476. Nels. Lutw. 62. Bull. N. P. 333. 2 Term Rep. 154, 5.

So where in an action of debt brought upon the statute 31 *Car.* 2. c. 2. s. 5. (the *habeas corpus* act) against a gaoler, for refusing the plaintiff, the party grieved, a copy of

Ward v. Snell. P. 28 G. 3. C. B. Hen. Bl. 10.

previous to his commencing any such action against the Hundred, to enter into a bond to the high constable of the Hundred, wherein the robbery was committed, in the penalty of one hundred pounds, with two sufficient sureties, to be approved of by the chief clerk or secondary, the filazer, or sheriff of the county, or the clerk of the pleas of the court in which the action is intended to be brought, before one of whom the bond is to be entered into, with condition for securing to such high constable the payment of his costs when taxed, in case the plaintiff should be nonsuited, or discontinue, or have a verdict, or judgment on demurrer against him,

his warrant of commitment, there was a verdict for 100l. (the penalty mentioned in that clause of the act) but neither damages nor costs.

A RULE had been obtained to shew cause why the prothonotary should not tax the plaintiff his costs, and why the associate should not endorse them on the *postea*.

IN support of the rule most of the books above referred to were cited and relied on. On the other side, the defendant's counsel urged the rule in *Pilfold*'s case, by which statutes of *addition* are distinguished from statutes of *creation*, holding that on those of the *latter* description, costs are not recoverable; that the *habeas corpus* act is a *creative* not an *accumulative* statute, giving a new remedy to the party suing, to which he was not entitled at the common law, and consequently within the above distinction.

LORD LOUGHBOROUGH saw no reason to doubt the authorities cited in support of the plaintiff's right to costs. The statute of *Gloucester* is a remedial act, and ought to have a favourable interpretation. The penalty in the present case accrues to the party grieved before action brought, who having recovered a debt, is entitled to the costs attending such recovery.

GOULD, *Justice*,—of the same opinion.—Costs are in the nature of a satisfaction. This is not a popular action; it is like an action on a bond to recover a debt already due, a right of action vests in the party grieved as soon as the

grievance is committed; but it is otherwise of a common informer, who has no interest till judgment.

HEATH, and WILSON, *Justices*,—of the same opinion. Rule absolute.

BUT no costs can be recovered in any action, prosecuted by a *common informer*, or prosecutor *qui tam*, except costs are expressly given by the statute inflicting the penalty; because antecedent to the commencement of the suit, a plaintiff, who sues as a common informer, has no right of action vested in him, or any interest in the penalty. He has sustained no particular or *private* injury, and therefore can have no claim beyond the precise penalty which the legislature has deemed it requisite to inflict, and adjudged to be a sufficient and adequate punishment for the *public* inconvenience or mischief, supposed to result from the offence prohibited. Vide post.

IF a statute double, or treble the damages in a case where single damages were recoverable at the common law, the costs also, as parcel of the damages, shall be doubled or trebled (as the case may be), though no costs should be given by such statute. Vide post. 2 Inst. 289. Gilb. C.P. 268. P. Aston. J. Cowp. 368. Dy. 159. b. Carth. 297.

AND the plaintiff shall have costs if he obtain judgment in his favour upon a demurrer, where he would have been entitled to them upon a verdict, damages being confessed by the demurrer. Com. Dig. Tit. Costs (A. 1.) Gilb. C.P. 168.

THE statute of *Gloucester* does not extend to give costs

upon the traverse of an inquisition, although damages may be found thereon for the prosecutor; to recover costs under that statute, there must be a plaintiff or defendant, demandant or tenant.

The King v. Inhabitants of Glastonby. H. 10 G. 2. B. R. B. R. H. 355. S. C. 2. Stra. 1069.

THUS upon a writ of *noctanter* the sheriff returned an inquisition, finding that the prosecutor had sustained damages to one hundred pounds, but that the writ came *tarde*, so that he could not restore the damages; hereupon an *alias distringas* was awarded to restore the damages, &c. Then two of the inhabitants of *Glastonby* came in and pleaded as to the damages, that the prosecutor had sustained no more than ten shillings; upon this plea, issue was joined both by the king's coroner and the prosecutor, and the jury having found damages to the amount of seven pounds and ten shillings, besides costs, a motion was made for costs *de incremento*.

LORD HARDWICKE,—delivered the opinion of the Court to the following effect: We are all of opinion, that we cannot give costs upon this proceeding, for we can find no such judgment given upon this * statute ever since it was made. Costs were never asked in a proceeding of this nature, but in a case in *Carth.* 239. 242 (*a*); the Court, however, there gave no opinion upon the point. And in the entry of a proceeding of this sort in 1 *Lutw.* 141. 155, there is no judgment for costs, and that case appears to have been well considered, and the writ of execution therein was corrected by Lord *Chief Justice* HOLT himself. Indeed in that case the traverse was taken not upon the damages, but upon the writ only; but that circumstance will not vary the case; for if the prosecutor had

* The writ of *noctanter*, is given by statute of Westm. 2. 13 Ed. 1. c. 46.

(*a*) The King v. Inhabitants of Hermitage. It was unnecessary for the Court to give any opinion as to costs, in that case; as the parties had entered into a rule by con-

been entitled to costs at all, he had an equal right to them in that case, as in this.

sent, that each of them should pay their own costs, by which they were held to be concluded.

THE words of the statute of *Gloucester* are, that the demandant shall recover against the tenant the costs of his writ purchased, together with his damages. Now the construction upon that statute is, that costs shall be recovered in such cases only where there is a plaintiff or defendant, or a demandant or tenant, but this case is entirely a traverse of an inquisition, and was so held 1 *Sid.* 212.—1 *Keb.* 741.

IT must be allowed it is reasonable the prosecutor should have costs, but that will not warrant us to do it without the direction of an act of parliament, and the rule settled and always adhered to is, that statutes which give costs are to be taken strictly. 1 *Salk.* 205.

IT is said, that the king (* and any person suing to his use, if the plaintiff be nonsuited, or a verdict pass against him) shall neither pay nor receive costs; for, besides that he is not included under the general words of the statutes relative to costs, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them; but, true as this principle may be in general, it must be understood with some restriction, since by statute 33 *H.* 8. c. 39. s. 54. it is enacted, that the king, in all suits upon specialties to himself, or to any other for his use, shall recover his just debts, *costs*, and damages, as common persons do in their suits.

3 Bl. Com. 400. Cowp. 367.
* Stat. 24 H. 8. c. 8.

SECT. II.

Where there shall be no more Costs than Damages, when the latter are found under Forty Shillings.

In Personal Actions, under the Statute 43 Eliz. *c.* 6. *s.* 2.

THE statute of *Gloucester*, we have seen, gave costs in all cases, where (according to its most rigid construction) damages were recoverable either before or by that statute. The amount of the damages to be recovered was totally immaterial, for a recovery of *any* damages, however small, satisfies the words of the act; but, as this general right to costs was found to be productive of several inconveniencies, the legislature, at length deemed it expedient, in certain instances, to abridge it.

ACCORDINGLY, for avoiding the infinite number of small and trifling suits, commenced or prosecuted in the courts at *Westminster* (which by the due course of the laws of this realm ought to be determined in inferior courts in the country) to the intolerable vexation and charge of her highness's subjects; the statute 43 *Eliz.* c. 6. s. 2. enacts, "If, upon *any* "*action personal* to be brought in any her majesty's courts at "Wetsminster, *not being for any title or interest of lands,* "*nor concerning the freehold or inheritance of any lands,* "nor *for any battery*, it shall appear to the judges for the "same court, and so signified or set down by the justices

Costs shall not be awarded beyond the amount of the damages, where the latter are under forty shillings.

" before whom the same shall be tried, that the debt or da-
" mages to be recovered therein, in the same court, shall not
" amount to the sum of forty shillings or above; that in every
" such case the judges and justices before whom any such
" action shall be pursued, shall not award to the plaintiff any
" greater or more costs than the sum of the debt or damages
" so recovered shall amount unto, but less at their discre-
" tions."

And by statute 11 and 12 *W.* 3. c. 9. s. 1. the 43 *Eliz.* is extended to, and made of the same force and efficacy in all suits commenced in the courts in the principality of *Wales* and counties palatine.

The avowed object of the legislature, in passing the statute 43 *Elizabeth*, was to confine all personal actions of small value, not being for any title of lands, nor for any battery, to the courts baron, and other inferior courts in the country; in order to increase the business, and consequently the profits of those courts, to diminish the costs of defendants, and prevent vexation by litigious plaintiffs; who, for purposes of mere oppression, might be inclinable to institute suits in the superior courts for injuries of a trifling value. But the statute did not fully effectuate the intentions of its makers. It does not make the finding of the damages, by the jury, below forty shillings, alone conclusive to deprive the plaintiff of his costs (and, perhaps, such a provision might be rather hard, as a jury may frequently give too little damages), but requires, likewise, a certificate from the judge, who tried the cause, that the damages, actually proved, were under that

Gilb. H. C. P. 262. 265.
Gilb. Eq. Rep. 195, 196.

sum; which certificate the judges, till very modern times, uniformly persisted in refusing. And the reason of such refusal might perhaps be, that, as causes were very injudiciously tried in inferior jurisdictions in the country, the courts of *Westminster Hall*, would not so far resent a plaintiff's prosecuting therein, as to deprive him of his full costs, by certifying upon the 43 *Eliz.* c. 6. that the damages to be recovered were under forty shillings. However, be that as it may, no instance of a certificate, upon this statute, is to be met with in the books, earlier than about the middle of the reign of King *George* the Second.

3 Wils. 329.

Vid. Gilb. Eq. Rep. 196.
3 Wils. 325.

ACTIONS concerning the title or freehold of lands, and of battery, are exempted, by the express words of the 43 *Eliz.* c. 6. from the operation of the certificate prescribed by that statute; and the three following decisions seem to have turned upon the extent and meaning of the words, adopted by the legislature to describe those excepted cases.

White vers. Smith, C. B. P. 17 G. 2. cit. 2 Str. 1232. 1 Wils. 94.

THUS, in an action for taking and carrying away sand and gravel upon *Hounslow-Heath*, the plaintiff recovered a verdict with damages under forty shillings; and Lord *Chief Justice* WILLES, who tried the cause, having certified, pursuant to the statute of 43 *Eliz.* c. 6. that the damages found by the jury, were the real damages to be recovered, the Court held it to be a case within that act of parliament, and refused to allow any more costs than damages.

Walker v. Robinson B. R. T. 18 & 19 G. 2.

So, in an action of trespass for assaulting the plaintiff, stopping his waggon, and taking away his cart rope, the de-

fendant justified the taking of the rope as a distress for toll, due to the corporation of *Doncaster*, under whom he was collector; the plea likewise stated a demand and refusal previous to the making of the distress; the replication traversed any demand of the toll before the distress, and issue being taken thereon, the plaintiff obtained a verdict, at the trial, with one shilling and sixpence damages. The cause was tried before Mr. *Justice* BURNET, who certified upon the 43 *Eliz.* c. 6. upon the *postea* in these words,—"I do here-"by certify that the damages to be recovered in this action "do not amount to forty shillings, but to one shilling and "sixpence, and no more." 1 Wils. 93. S. C. 2 Str. 1232.

THE plaintiff obtained a rule to shew cause why he should not have full costs in this case, notwithstanding the judge's certificate; on the grounds that an asportation was laid in the declaration, and there was special pleading, either of which circumstances, it was alleged, had been always held sufficient to carry full costs; but after argument, the rule was discharged. And

LEE, *Chief Justice*,—said, This is merely a personal action, where no freehold was in question, neither was there any battery, but only an assault; and as the judge who tried the cause, has certified that one shilling and sixpence are the damages, there is nothing to take it out of the statute of *Elizabeth*.

DENISON, *Justice*.—This is a new case; I have heard it said that this statute of 43 *Eliz.* c. 6. had been explained

away, but imagine *that* arose from its never having been put in use. This statute was intended to explain the statute of *Gloucester*, which was evaded by laying the damages in the declaration above forty shillings, and was to enforce the true meaning of the statute of *Gloucester*, and therefore enacted, that, if the judge would certify that the damages given were the proper damages, and which the jury ought to give, and no more, so that it might appear that the action ought properly to have been brought in an inferior court, then the superior court was to allow no more costs than damages. I confess, I think there are many actions, and that this is one of them, where neither the freehold may come in question, nor any battery confessed or proved, very proper to be brought in a superior court, though the damages may not amount to sixpence, for the *quantum* of the damages is not so much the matter in controversy here, as the prescription and right to the toll. The statute of 43 *Eliz.* and that of 22 *Car.* 2. are very different, the *first* by certificate *deprives* a plaintiff of full costs, the *other*, by certificate, *entitles* him to full costs; but notwithstanding I think this a proper action to be brought here, yet, as the judge has certified, I do not see how this court can adjudge directly contrary to an act of parliament. The action of battery was possibly put into the statute of *Elizabeth*, because it might be then thought that such action would not lie in the county court; and to be sure it will not with *vi et armis*, but I do not know but it will lie without *vi et armis*.

Vide statute of Gloucester, c. 8.

Wright and Foster, *Justices*, of same opinion. Rule, for full costs, discharged.

AGAIN, in an action of trespass, a case was reserved for the opinion of the Court, which stated, that the action was brought for taking a distress; that the defendant justified the taking, as agent to General *Cholmondley*, by virtue of a reservation in a lease of land from the general to the plaintiff; and that, issue having been joined upon a traverse of the agency of the defendant, a verdict was found for the plaintiff, with one penny damages, and that the judge, who tried the cause, had certified pursuant to the statute 43 *Eliz.* c. 6. Howard, v. Cheshire, B.R. M. 29 G. 2. Say. Rep. 250.

DENISON, *Justice*, delivered the opinion of himself, and FOSTER, *Justice*,—(RYDER, *Chief Justice*, and WILMOT, *Justice*, being absent.) It has been said, that this is not a case in which a certificate ought to be granted upon the 43 *Eliz.* c. 6. an interest in land being in question, and the case of *Asser* v. *Finch* has been relied upon; in which it was holden, that the plaintiff, for whom a verdict was found upon an issue, joined on a plea of *extra viam*, was entitled to full costs. But in that case, the extent of the way, and, consequently an interest in land, was directly in question; whereas, in the present case, the issue is collateral to the plaintiff's interest in the land demised. The plaintiff can have no more costs than damages. 2 Lev. 234.

ALTHOUGH a plea of tender should be found against the defendant, yet, if the plaintiff do not recover damages to the amount of forty shillings, there may be a certificate upon the statute 43 *Eliz.* c. 6.

As where, in an action of *assumpsit*, the defendant Bartlett, v. Robbins, C. B.

P. 5 G. 3. 2 Wils. 258.

pleaded a tender of half a guinea, which the plaintiff having taken out of court, proceeded for more, and, on the trial, obtained a verdict with a guinea damages. The judge certified, according to the 43 *Eliz.* that the damages to be recovered did not amount to forty shillings. It was moved, that the prothonotary might tax the plaintiff costs *de incremento*; to which end it was alleged, that here the judge was precluded from certifying, because the defendant, by his own false pleading, his plea of tender having been found against him, had occasioned an increase of costs; so, it was said, if a defendant remove a cause out of an inferior court, he is not entitled to this certificate, because it was his own fault to remove the cause, and thereby put the plaintiff to greater expence.

CHIEF *Justice* (Sir CHARLES PRATT).—I believe that, in some cases, such a rule has obtained, because the defendant has by his own fault rebutted his right to costs, by bringing another matter in question. And, he added, this action is clearly frivolous, and the plea of tender does not alter the case. Rule, for full costs, denied.

As the restriction of actions of small value to the county, and other inferior courts, appears to have been the sole object of the 43 *Eliz.* c. 6. it should seem, that the legislature only meant to empower a judge to deprive a plaintiff of full costs, by a certificate upon that statute, in those kinds of actions, that are the objects of the jurisdiction of such inferior courts. This notion formerly prevailed, but it was holden in a very late determination, by the Court of King's Bench,

that the words of the statute warrant no such construction, but comprehend *all* personal actions (not being for any title to lands, nor for any battery); even actions *vi et armis*, which cannot be brought in a county court.

THUS, in an action of trespass *vi et armis* for beating the plaintiff's dog, whereby the dog was hurt, and the plaintiff lost the use of him; the defendant pleaded the general issue; and verdict for the plaintiff with one shilling damages; and Lord KENYON, *Ch. J.* before whom the cause was tried, certified, under the 43 *Eliz.* c. 6. that the damages were under forty shillings.

Dand v. Sexton. B. R. H. 29 G. 3. 3 Term. Rep. 37.

A MOTION was made for a rule to shew cause why the certificate should not be set aside, on the ground, that the statute only applied to those actions which could be brought in the county court, and that of course it did not extend to an action *vi et armis*: and a case of *Delamotte* v. *Dixon* was cited, in which BULLER, *Justice*, under an idea that the statute had been understood to be thus confined, refused a certificate.

Sittings after Mich. 27 G. 3. B. R.

LORD KENYON, *Chief Justice*.—It seems to me, that this case comes within the statute, which extends to all personal actions, not being for any title of lands, nor for any battery. And, on the maxim *exceptio probat regulam*, it includes all other actions *vi et armis*. It is true, indeed, that an action *vi et armis* cannot be brought in a county court: but there are other inferior courts which by charter have a power of trying actions *vi et armis*. But, his lordship added, as some

of the judges have entertained doubts upon the question, take a rule to shew cause.

Supra.

BUT, afterwards, when cause was to have been shewn, the Court were extremely clear, on the authorities of *Walker* v. *Robinson*, *White* v. *Smith*, and *Bartlet* v. *Robbins*, that the statute extended to the present case; and therefore discharged the rule.

Hovard v. Cheshire. B. R. M. 29 G. 2. Say. Rep. 260. Sed vide post.

IN trespass the defendant pleaded, by leave of the Court, not guilty, and a justification; at the trial the plaintiff obtained a verdict upon both pleas, with one penny damages, and the judge certified upon the statute of *Eliz.* but did not certify pursuant to the 4 *Anne*, c. 16. that the defendant had a probable cause to plead the special matter. And upon these facts, the question was, whether the plaintiff was entitled to the costs of the plea of justification?

DENISON, *Justice*, pronounced the judgment, and said, that it had been resolved at a meeting of all the judges, that under these circumstances the plaintiff was *not* entitled to the costs of the special plea.

Holland v. Gore. C.B.T. 32 G. 2. Say. Costs 18.

IT has been holden, that a certificate upon the statute of 43 *Eliz.* c. 6. may be granted after the trial of the cause.

Vide Cas. Pr. C. B. 44. *in notis.* 2 Lev. 124. 3 Salk. 115. pl. 9. 1 Ld. Raym. 396.

IT is said that the 43 *Eliz.* c. 6. does not extend to actions commenced in an inferior court, but removed, before trial, by *habeas corpus* into a superior court. This doctrine does not seem to be grounded on any express adjudication, and

must, perhaps, be understood with a reference to the party removing the suit. For though a judge should not be absolutely precluded from certifying upon the 43 *Eliz.* c. 6. in any case, within that statute, where the action is tried in a superior court, and damages found under forty shillings, in what court soever the suit was instituted, yet it is reasonable to presume, that a certificate will hardly be granted, where the cause has been removed by the *defendant*, as it would be enabling a defendant, by such a device, to deprive a plaintiff of his costs, which he would have had if the suit had been determined in the court below; and, on the other hand, should the removal have been effected by the plaintiff, it is equally fair to presume that, if he recover damages under forty shillings, the judge will grant a certificate.

In Actions of Slander.

In actions of slander under 40*s.* the plaintiff shall recover no greater costs than damages.

By statute 21 *Jac.* 1. c. 16. s. 6. it is enacted—"That "in all actions upon the case for slanderous words, to be "sued or prosecuted by any person, or persons, in any the "courts of record at *Westminster*, or in any court whatso- "ever that hath power to hold plea of the same, if the jury "upon the trial of the issue in such action, or the jury that "shall inquire of the damages, do find or assess the damages "under forty shillings, then the plaintiff, or plaintiffs, in "such action shall have and recover only so much costs as "the damages so given, or assessed, amount unto, without "further increase of the same; any law, statute, custom, or "usage, to the contrary, in any wise, notwithstanding."

Gilb. Eq. Rep. 196.

THIS statute is a direct repeal of that of *Gloucester*, 6 *Edw.* 1. c. 1. *quoad* actions of slander; for in these, if the damages recovered do not amount to forty shillings, costs *de incremento* are taken away, by express and positive words.

Salk. 207.

IT is said to have been resolved by all the judges of the Courts of King's Bench and Common Pleas, that, notwithstanding *they* are precluded by the positive words of the statute 21 *Jac.* 1. from giving more costs than damages, where the latter have been found, or assessed, under forty shillings, in an action for slanderous words, the *jury* are not restrained by that statute, in assessing the costs, but may give ten pounds costs, where they give but ten-pence damages.

Lawe v. Harwood. M. 4 Car. 1. Cro. Car. 141. per 3 Just. Hyde, Ch. J. dub. S. C. 1 Jon. 196. Palm. 529. Ley 82.

AN action for *slander of title*, as hath been resolved, is not within the statute 21 *Jac.* 1. c. 16; which only relates to actions for slanderous words concerning the persons of men, and not concerning the title of land, where the special damage is the gist of the action.

IN an action for words, in themselves *not* actionable, where the special damage occasioned by their publication, is the only cause of action, the plaintiff is entitled to full costs, of whatsoever amount the damages found, or assessed, may happen to be.

Browne v. Gibbons. B.R.H. 1 Ann. Salk. 206. S. C. 2 Ld. Raym. 831. 7 Mod. 129.

THUS, in an action for slanderous words spoken of the plaintiff's wife, namely, that she was a whore, *per quod* he lost such and such customers, particularizing them, there was a verdict for the plaintiff, with twenty shillings damages.

It was holden that there should be full costs; for it was not the words, but the special damage, which was here the cause of action, and without proof of which the action could not be supported; for proof of the words alone would not be sufficient, not being of themselves actionable; and, therefore, such an action lies for the husband, without joining the wife, which is otherwise in a common action for words.

S. P. Bass. v. Hickford. B. R. P. 12. G. 2. Andr. 375. Mitchell v. Younghusband. M. 18 G. 2. Barnes 135. Agr. 2 Ld. Raym. 1588. 2 Keb. 654. S. P. Roberts v. Holywell. B. R. P. 5 G. 2. 2 Kelyng 64.

So if, in an action upon the case for slanderous words, in themselves actionable, a substantive injury, which would, of itself, be a sufficient ground of action, independent of the words, be alleged as a distinct fact, and not laid as a mere consequence of the words,—*any* damages, however small, found upon a general verdict for the plaintiff, will entitle him to full costs.

THUS, where, in such an action, the declaration, after stating the slanderous words in the usual manner, proceeded thus,—" by reason of the publishing whereof, the said " plaintiff is not only much hurt and damnified in his good " name, &c. *but also by occasion of the said words, through " the procurement of the defendant*"—was taken up, and carried before a justice of the peace (the words charging him with stealing a hen); the plaintiff obtained a verdict with one shilling damages, and then moved for full costs. And it was resolved that he was well entitled to full costs, because the procuring the plaintiff to be arrested, and conveyed before a magistrate, was not laid merely in aggravation of damages, but as a substantive and independent injury, and was a distinct cause of action, importing *crimen feloniæ ei imposuit*.

Carter v. Fish. B. R. M. 12 G. 1. 1 Str. 645. S. P. Topsal v. Edwards. B. R. M. 5 Car. 1. Cro. Car. 163. Blizard v. Barnes B. R. H. 8 Car. 1. Cro. Car. 307. Semb. Philips v. Fish B. R. T. 11 G. 1. 8 Mod. 371. vide etiam. 1 Str. 192. 2 Ld. Raym. 1589.

BUT, where the words are in themselves actionable, and special damages are laid merely in aggravation, and as a consequence of the words; and not as the essential cause of action, though they should be proved, yet, if the damages recovered do not amount to forty shillings, there shall be no more costs than damages.

Burry v. Perry B. R. T. 5 and 6 G. 2.
2 Ld. Raym. 1588.
S.C. 2 Str. 936.
2 Barnard. K. B. 79, 84, 113, 155.
2 Kelyn. 71.
S. P. Woodhouse v. Bidwell.
T. 22 Car. 2 B. R.
2 Keb. 654.
7 Mod. 129. agr. acc.
Bull. N. P. 11. acc.

THUS, where the plaintiff, a house-smith by trade, declared upon words, which were actionable in themselves, and stated that, by reason of the speaking thereof, he had lost several customers, (the names of whom were respectively set forth). The defendant pleaded the general issue, and, at the trial, a verdict was found for the plaintiff, with five shillings damages. A motion was made, on behalf of the plaintiff, for full costs; to which, it was alleged, he had a title, notwithstanding he had not recovered forty shillings damages, because he had received a special damage, namely, the loss of customers. But by the court, where the words are actionable of themselves, as in the present case, and special damages are laid by way of aggravation, and damages are under forty shillings, there shall be no more costs than damages, for that is properly an action for words within the statute 21 *Jac.* 1. c. 16.

BUT the distinction taken, in the cases just cited, between words actionable and not actionable, with regard to their carrying full costs, when joined with special damage, was denied, in one instance, to be well founded, by the Court of Common Pleas.

THE case was, in an action upon the case for slanderous words, in themselves actionable, the plaintiff, who was a grocer, stated in the declaration, as special damage, the loss of several customers, naming them particularly; and, at the trial, a general verdict was found, damages ten shillings. It was insisted for the plaintiff, that the special damage, took his case out of the statute 21 *Jac.* 1. especially as, otherwise, the plaintiff would be without redress, since no declaration could be devised for the special damage, without first setting out, as here, the words from which such damage resulted. For the defendant the doctrine laid down in the case of *Burry* v. *Perry* was advanced and relied on; but by the Court, there was no foundation for the distinction contended for by the defendant; and they directed the prothonotary to tax *full* costs for the plaintiff.

Denny v. Wigg M. 10 G. 2. Cas. Pr. C. P. 137. S. C. Pract. Reg. 111.

Supra.

HOWEVER little, or perhaps no reliance ought to be placed on the last decision, since it has been repeatedly over-ruled and contradicted by subsequent determinations, in which both the Courts of King's Bench and Common Pleas have uniformly adhered to the principle, on which the cases of *Burry* v. *Perry*, and *Woodhouse* v. *Bidwell*, were decided.

THE plaintiff declared upon several sets of slanderous words, spoken of him in the way of his trade, *per quod* *Charles Hedges* refused to deal with him upon credit; and had a verdict in his favour, damages two-pence.

Turner v. Horton P. 16 G. 2. Barnes 132.

BY the Court;—The plaintiff can have no more costs than damages; the true distinction is, that where the words are

actionable in themselves, without the special damage, that is a case within the act of parliament, and the plaintiff can have no more costs than damages (where the latter are under forty shillings). But where the words are not actionable in themselves, but the action is maintainable only with respect to the special damage, then it is a case at large, and out of the statute; and, if *any* damages are recovered, the plaintiff will be entitled to full costs. Where the words are actionable, as in this case, the special damages are to be considered merely by way of aggravation, and no notice ought to be taken of them in the verdict, which must be, generally, guilty, or not guilty. Where the words are not actionable, there the special damages are the gist of the action; and if the jury find the defendant guilty of speaking the words, and acquit him as to the special damages, the verdict ought to be so taken.

H. 25 G. 2. Barnes, 142.

In the case of *Tiffin* v. *Glass*, the same question occurred, and received a similar determination.

P. 5 G. 3. B. R. 3 Burr. 1688. B. R. H. 7 G. 3.

So in *Surman* v. *Shelleto*, and *Baker* v. *Hearne*, the same rule was adopted by the Court, and not controverted by the plaintiff's counsel; the only question made, in each of those cases, being whether the words were, or were not in themselves actionable; the Court were of opinion that they were actionable, as reflecting on the plaintiffs in their trade, and, the damages being under forty shillings refused to allow costs beyond their amount, notwithstanding the special damage laid in the declarations.

And, finally, this point was considered as having been so

completely settled by the preceding authorities, that, in a modern decision of the Court of Common Pleas, it was deemed not open to argument upon principles.

Collier v. Gaillard. C.B.P. 16 G. 3. 2 Blackst. 1062.

THIS was an action upon the case for words, importing that the plaintiff had feloniously stolen a glass bottle. The declaration contained three counts, which differed no otherwise than in stating the words different ways; by means whereof the plaintiff was publicly searched, and exposed to great disgrace, and one *John Woolgar* and others had since refused to trust him. Plea, not guilty. General verdict for the plaintiff, and damages, one shilling.

A MOTION was made for the prothonotary to tax full costs, on the ground that, although the words in the first count were actionable, yet those contained in the second and third counts were not so, and there being a general verdict upon the whole declaration, some of the damages must be intended to be given upon each of those counts, which, though it were but a farthing, would carry full costs, as it could only be given for the special damage.

BUT the Court were of opinion that all the three sets of words were equally actionable; and by GOULD, *Justice*, (*absente* DE GREY, *Chief Justice*).—The distinction, stated by the plaintiff's counsel, between words actionable and not so, with regard to their carrying costs, when coupled with special damages, and the verdict under forty shillings, is a clear and settled distinction. There must be, here, no more costs than damages.

BLACKSTONE, *Justice.*—I must yield to the weight of authorities which have established this distinction, though I think it is too artificial and refined. In my own plain understanding, I can easily conceive, that the smallness of the damages ought to exclude full costs, even though the plaintiff complains of a special injury, whether the words are actionable or not; and therefore I have no scruple in discharging the present rule. But I cannot so well reconcile it to my own mind, that *cæteris paribus* the plaintiff shall recover full costs, if the words are innocent, but not so, if they are highly scandalous.

NARES, *Justice.*—The rule is certainly settled, as it was stated at the bar, and now by my brother GOULD. Rule discharged.

Littlewood v. Smith C. B. P. 9 W. 3. 1 Ld. Raym. 181.

NOTWITHSTANDING the comprehensive nature of the words used by the legislature in the 21 *Jac.* 1. c. 16.—"to "be sued or prosecuted in any the courts of record at *West-* "*minster, or in any courts whatsoever*, that hath power, &c." it hath been holden, that courts baron, and other inferior courts, wherein the jury are precluded from legally assessing damages to the amount of forty shillings, are not within the meaning or intent of that statute, but that such courts have still a power of allowing full costs, in actions of slander, prosecuted therein, however small the *quantum* of damages found or assessed, may be. And the Court said, that if a contrary construction were to be put upon the statute, it would be impossible for courts, wherein damages cannot be given to the amount of forty shillings, to tax costs *de incre-*

mento in any action of slander, beyond forty shillings; and therefore, the act must necessarily be intended of courts, in which the jury have a power, if they please, of finding damages to any amount, according to the nature of the case. And *Wright*, Serjeant, who was not in the cause, said that full costs were given in all the courts baron in *England*, notwithstanding the statute 21 *Jac.* 1. c. 16.

BUT if, in an action for slander, commenced originally in an inferior court, and removed into one of the courts at *Westminster*, by *habeas corpus*, the plaintiff recover damages under forty shillings, he shall have no more costs than damages. Anon. C.B.T. 12 Ann. 2 Com. Dig. 546. Vide Latch, 2, 58.

A PLEA of justification, in an action upon the case for slanderous words, will not take it out of the statute 21 *Jac.* 1. c. 16. and therefore, notwithstanding such special pleading, the plaintiff will not be entitled to full costs unless he recover a verdict with damages to, or beyond, the amount of forty shillings. And in one case, where the plaintiff, who had recovered small damages, under forty shillings, in an action of slander, in which the defendant had justified, under an idea that the justification had taken it out of the statute, had procured full costs to be taxed, and charged the defendant in execution, the Court set aside the execution, and ordered restitution to be made with costs;—holding that pleading not guilty, or a justification creates no difference, being equally within the meaning of the statute. Anon. M. 7 G. 1. Cas. Pr. C. P. 22. 2 Wils. 258. per Clive, J. Semb. acc. Dovor v. Robinson. P. 13 G. 2. Barnes 128.

UPON a writ of inquiry of damages, in an action for words, the jury assessed the damages at ten shillings, and the costs Lampen v. Hatch. B.R. P. 5 G. 2.

2 Str. 934. S.C. 2 Kely. 61. *de incremento* were taxed at thirteen pounds, and judgment entered up accordingly; a writ of error having been brought, the Court reversed the judgment *in toto*, it being a joint judgment, and not like the cases where no costs can be given, and there is a distinct judgment.

Vide 1 Str. 188. 2 Str. 808. 4 Burr. 2019.

2 Show. 506. In an action of *scandalum magnatum* no costs are recoverable, however large the damages may be, for which the plaintiff obtains a verdict.

SECT. III.

Where there shall be full Costs, although the Damages recovered are under Forty Shillings, and where not.

It has been observed, in a former part of this work, that, till modern times, the judges seldom or never exercised the discretionary power, vested in them by the 43 *Eliz.* c. 6. of depriving a plaintiff of full costs, by certifying, upon the *postea*, that the damages to be recovered did not amount to forty shillings. The remissness of the judges in this particular, gave rise to another statute, the object of which is precisely the same, as that of the statute of 43 *Eliz.* namely, the diminution of trifling and frivolous suits in the courts at *Westminster*.

The statute 22 and 23 *Car.* 2. c. 9. s. 136. for prevention of trivial and vexatious suits in law, contrary to the intention of an act made in the three-and-fortieth year of Queen *Elizabeth*, for avoiding of infinite numbers of small and trifling

suits commenced in the courts at *Westminster*,—further enacts, for making the said law effectual, "That in all actions "of *trespass, assault and battery*, and *other personal actions*, "wherein the judge, at the trial of the cause, shall not find "and certify under his hand, upon the back of the record, "that *an assault and battery* was sufficiently proved by the "plaintiff against the defendant, or that *the freehold* or *title* "*of the land mentioned in the plaintiff's declaration* was "chiefly in question, the plaintiff in such action, in case the "jury shall find the damages to be under the value of forty "shillings, shall not recover or obtain more costs of suit "than the damages so found shall amount unto: and if any "more costs in any such action shall be awarded, the judg-"ment shall be void, and the defendant is hereby acquitted "of and from the same, and may have his action against the "plaintiff for such vexatious suit, and recover his damages "and costs of such his suit in any of the said courts of re-"cord."

ALTHOUGH the language of the statute 22 and 23 *Car.* 2. should seem sufficient to comprehend every species of personal actions, yet its operation hath been restrained to two kinds only of such actions, namely, *trespass quare clausum fregit*, and *assault and battery*. The reason assigned for this construction, is, that, since a certificate that the freehold or title of the land was chiefly in question, or an assault and battery proved (according to the nature of the action) is made an indispensable requisite to give a title to full costs, where the damages are found under the value of forty shillings, it is obvious the legislature never intended to include within the pro-

Gilb. H. C. P. 263.
Gilb. Eq. Rep. 196.
3 Keb. 31, 389.
Comb. 324, 5.
Salk. 208.
1 Str. 577.
Raym. 487, 8.
Vide etiam
1 Freem. 214. 226, 366.
3 Keb. 469.

visions of that statute, any other personal actions, but those wherein it is practicable for the judge to grant the certificate thereby prescribed; which is only in the two species of actions above particularized.

Gilb. H. C. P. 264.

An argument hath been drawn in favour of this construction, from the statute 8 and 9 *W.* 3. c. 10, for, it is said, the inconvenience was, that small trespasses, under the value of forty shillings, were committed with impunity, since no redress could be obtained for such injuries, in the courts at *Westminster*, without losing the costs of suit; and therefore the last mentioned statute enacts, that, in all actions of trespass, wherein it shall appear that the trespass was wilful and malicious, and be so certified by the judge, the plaintiff shall recover full costs. But Lord *Chief Justice* Willes, in delivering his opinion in the case of *Milburne* v. *Reade*, drew a very different inference from the statute alluded to. His Lordship, after stating the 8 and 9 *W.* 3. proceeds thus, This statute plainly shews, that the legislature did not understand that of the 22 and 23 *Car.* 2. c. 9. in the same manner, as the courts of law did, *viz.* to confine it to two sorts of actions, but that it extended to all other personal actions; for the 8 and 9 *W.* 3. was intended only to relieve in the very same sort of actions as the statute of *Car.* 2. did, but gave costs upon a different principle; not to prevent frivolous and vexatious suits, as was the object of the statute last mentioned, but to prevent wilful and malicious trespasses, and *that*, not malicious in lands only, but of all sorts; and if the legislature had imagined, that the statute of *Car.* 2. took away costs from no trespasses besides *clausum fregit*, and *assault and battery*,

Vide post.

3 Wils. 325.

they could have had no reason for making the 8 and 9 *W.* 3. general, and to be extended to all trespasses.

And, indeed, it should seem from the generality of the words of the 22 and 23 *Car.* 2. to have been the intention of the legislature, thereby to preclude a plaintiff from recovering full costs in *all personal actions*, prosecuted in the courts at *Westminster*, where the damages were found under forty shillings, except in cases of freehold or title, and assault and battery, and even in these, without a certificate that the one was in question, and the other proved. And this construction seems obvious, if we advert to the object, which the legislature had in view when they passed this statute. The judges under the 43 *Eliz.* c. 6, possessed a power of obstructing full costs, in all personal actions, not being for any title of land, nor any battery, by certifying that the damages recovered were under forty shillings; but this power, resting wholly in the discretion of the judges, was never carried into execution. The intention, then, of the legislature in passing the 43 *Eliz.* c. 6. being frustrated by the averseness of the judges to certify in pursuance of that statute, they changed their ground, and endeavoured to accomplish their original design,—the restriction of minute and trivial actions to the inferior courts, by a different method; and therefore the statute of 22 and 23 *Car.* 2. does not leave the matter in the discretion of the judge, at least not in so extensive a degree, but expressly prohibits full costs in actions of trespass, assault and battery, and other personal actions, without a certificate of the proof of an assault and battery, or that the freehold was in question.—

The reason for allowing full costs where the freehold was in question, or an assault and battery proved, (I mean when the judge has so certified) seems to be, that as actions for these injuries cannot, in general, be prosecuted in inferior courts (though, perhaps, an action of assault and battery without *vi et armis*, may) it is but just that a party injured should be allowed to prosecute the same in the courts at *Westminster*, and be entitled to full costs on a recovery of *any* damages, however trifling the amount.

Vide 2 Inst. 311. Carth. 108.

Earl of Pembroke v. Westall, B. R. H. 24 Car. 2. 3 Keb. 121. Ibid. 247. Vide 1 Freem. 226. 366.

And in some of the first cases which arose on this statute, the Court seemed to adopt this construction. And in *Claxton* v. *Laws*, B. R. M. 25 *Car.* 2. which was trespass for taking the plaintiff's bull, and verdict for him with 25 shillings damages, the point is said to have been referred to the officers of the respective courts of King's Bench and Common Pleas, on whose report, the former court resolved, that the plaintiff should have no more costs than damages; which could only be done under the idea that the statute comprehended all personal actions.

Supra. 41. Vide acc. 3 Wills. 322, &c. Brown v. Taylor, B. R. P. 3 Keb. 31.

However since the latter of these determinations, down to the present time, the courts have uniformly adhered, in their resolutions, to the rule of construction laid down in the books first cited;—namely, that the statute of 22 and 23 *Car.* 2. only extends to cases in which a judge *can* certify, that the title was in dispute, or an assault and battery proved. And it is somewhat remarkable, that a case occurs prior in point of time to either the Earl of *Pembroke* v. *Westall*, or *Claxton*

v. *Laws*, and in the same reports, wherein the Court are made to say, that the rule had been so settled by the major part of the judges of *England*.

ON writs of inquiry, in cases within the 22 and 23 *Car.* 2. the plaintiff shall have full costs, notwithstanding he may not recover damages to the amount of forty shillings. Sheldon v. Ludgate C. B. T. 3 G. 1. Bull. N. P. 329.

So it hath been holden that, where a cause originally begun in an inferior court, is removed into one of the courts at *Westminster* by the *defendant*, the plaintiff shall have full costs without a certificate, howsoever small the damages, for which he obtains a verdict, may be. But it is otherwise where the removal is effected by the plaintiff, for, if by such means he could entitle himself to full costs, it would enable him to elude the statute, and become only the more vexatious. 2 Lev. 124. 4 Mod. 378, 9. 3 Keb. 357, 423. 1 Ld. Raym. 395. 3 Salk. 115. pl. 9. Gilb. H. C. P. 270. Cas. Pr. C. B. 44. n. (a). Vide 1 Freem. 365. 374. 3 Keb. 389.

THOUGH the Court cannot, in a case within the statute 22 and 23 *Car.* 2. award more costs than damages, where the latter do not amount to forty shillings, without a certificate, yet the jury may, by their verdict give costs to any amount, even above forty shillings, notwithstanding they may give damages under that sum. Watkinson v. Swyer P. 1 G. 2. Cas. Pr. C. B. 44. S. P. Ibbeson v. Brown P. 11 G. 2. Ibid. 149. Page v. Kirk C. B. T. 33 Car. 2. 2 Vent. 36.

A CERTIFICATE, upon this statute, must, by the express words thereof, be granted by the judge at the trial of the cause.

JUDGES have differed as to their notions of giving these Bull. N. P. 330. 3 Wils. 328.

per Willes, Ch. J. Semb. acc.

certificates; many having thought themselves bound by the verdict; others thinking that the statute meant to leave it to their discretion on the whole circumstances of the case; and the latter seems to be now the prevailing opinion, as otherwise the statute would be entirely useless.

By statute 12 and 12 *W.* 3. c. 9. s. 1.—the 22 and 23 *Car.* 2, and all other statutes then in force, made for the prevention of frivolous and vexatious suits, in the courts at *Westminster*, are extended to suits commenced or prosecuted in the court of great sessions in *Wales*, or any of the courts for the counties palatine.

Of Costs in Actions of Assault and Battery.

To constitute a title to full costs, in this species of action, where the damages are found under forty shillings, the judge must certify that *both an assault and battery* were proved; a certificate of the proof of the former alone will not be sufficient.

Smith v. Neesam B. R. P. 26 Car. 2. 2 Lev. 102. S. C. 3 Keb. 283. 335. Vid. 1 Vent. 256. Comb. 222. acc. 1 Freem. 366. S. P. moved but not decided.

Thus, in an action of assault and battery, the jury found the defendant guilty of the assault and not guilty of the battery, and damages under forty shillings, and Hale, *Chief Justice*, who tried the cause, certified that the *assault* was well proved; it was holden that the plaintiff should have no more costs than damages; for the statute requires, in actions of assault and battery, express proof of a battery to be certified.

ALTHOUGH an action may import to be an action of assault and battery, yet, if it be maintainable in respect only of the special damage resulting from the offence, it is not a case within the statute of *Car.* 2.

As where the plaintiff, in an action for beating his servant, *per quod servitium amisit*, obtained a verdict with damages under forty shillings; it was resolved not to be within the statute 22 and 23 *Car.* 2, not being properly an action of assault and battery, but an action grounded upon the special damage sustained by the loss of service; and the plaintiff had full costs, without any certificate.

Peak v.—B.R. T. 25 Car. 2. 3 Keb. 184. Acc. 2 Ld. Raym. 831. 1 Salk. 206. 7 Mod. 129. 1 Str. 192.

NEITHER is an action for criminal conversation with the plaintiff's wife within this statute, since the criminal conversation is the gist of the action, and not the assault.

THUS, in an action of trespass and assault, against the defendant for criminal conversation with the plaintiff's wife, *per quod consortium amisit*, the jury gave one pound eleven shillings and six-pence damages, and there was no certificate. The prothonotary having taxed full costs for the plaintiff, a rule was obtained to shew cause why this taxation should not be set aside, because, it was alleged, this action fell within the provision of the statute 22 and 23 *Car.* 2, whereby the plaintiff, there being no certificate of the sufficient proof of an assault and battery, could have no more costs than damages, the latter being under forty shillings.

Batchelor v. Bigg C. B. M. 13 G. 3. 2 Bl. 854. S. C. 3 Wils. 319.

FOR the plaintiff it was argued, that this was not an action

of assault and *battery*, but of assault only; for though it was laid in the declaration, that the defendant with force and arms, &c. made an *assault* upon the plaintiff's wife, yet the words *assault* and *force and arms* were mere words of course, and only matter of form; the gist and substance of the action was the *criminal conversation*, and therefore the wife was not joined; and besides that no *battery* was laid or charged in the declaration.

And of this opinion were the Court; and said that this was an action of trespass, in nature of an action upon the case, for the special damage. Rule discharged with costs.

If another trespass, not within the statute of *Car.* 2, for which a distinct satisfaction might be obtained in a separate action, (as a *spoliation* of personal chattels, which was the case of *Milburne* v. *Read* hereafter mentioned) be stated in the declaration, in an action of assault and battery, as a substantive and independent injury, and a general verdict found on the whole charge for the plaintiff;—he shall have full costs, notwithstanding the damages may be under forty shillings, and the judge may not have certified an assault and battery to have been proved. But, perhaps, it may be difficult sometimes to ascertain what shall or shall not be deemed to amount to such a separate injury, as will, on a general verdict, supersede the necessity of a certificate;—the succeeding cases appear to have involved this question.

Boiture v. Woolrick, B. R. P. 12 W. 3. 1 Ld. Raym. 566.

In an action of trespass, *quare clausum fregit*, of assault, battery, wounding, and for disturbing the plaintiff in his quiet

possession, &c. upon not guilty pleaded, a general verdict was given for the plaintiff, and damages under forty shillings; it was contended that the plaintiff was entitled to full costs, notwithstanding the judge had granted no certificate, since the defendant was found guilty of the *wounding* and *disturbance of possession*;—but the Court rejected the motion.

Beck v. Nichols C. B. M. 10 G. 1. 1 Str. 577. S. C. cit. Gilb. Eq. Rep. 197. Cas. Pr. C. B. 24.

In another case, which was trespass of assault, battery, wounding, and imprisonment, and also for breaking and entering plaintiff's house, and opening the doors thereof, and breaking the locks and three bars belonging to the said doors, the defendant pleaded not guilty to all except the imprisonment, which he justified; on the trial the justification was found for the defendant, and the not guilty for the plaintiff. Damages two shillings and sixpence. And resolved by the Court, that, the damages being under forty shillings, the plaintiff could not have full costs for the battery, because the judge had not certified it to be proved; neither could he have full costs for breaking the house, &c. because this was a trespass relating to the freehold, and no certificate that it was in question. But it is said that, if the defendant had not justified the imprisonment, and had been found guilty of that, the plaintiff would have been entitled to full costs.

1 Bac. Abr. 515 *marg.*

Clarke v. Othery, B. R. P. 11 G. 1. 1 Str. 624. S. C. 2 Com. Dig. 545.

Again, in an action of trespass, the plaintiff declared for an assault and battery upon himself, and also for striking his horse, by which he was lessened in value; plea, not guilty, and a general verdict for the plaintiff; damages twenty shillings, but no certificate from the judge. The plaintiff moved for full costs on account of the special matter stated relative

to the horse; which, on consideration, were refused by the Court.

Milburne v. Read, C. B. T. 17 & 18 G. 2. Barnes, 134. S. C. cit. 3. Wils. 322.

In another case, which was an action of trespass, the declaration stated, that the defendant, with force and arms, assaulted the plaintiff, in the parish of *A.* in the county of *Northumberland*, and did there beat, wound and ill treat him, so that his life was despaired of, and did then and there also obstruct the plaintiff from getting coals, and the coals of the plaintiff then and there found, took and carried away, and other coals to the value, &c. trod upon and spoiled, and one standard of the plaintiff there lately erected, and one roller fixed thereon, of the value, &c. did take, break, and pull down, and other goods and chattels of the plaintiff, to the value, &c. did take and carry away. The declaration contained another count, varying very little from the first; plea, not guilty. At the trial the jury found the defendant guilty of all the premisses, except the taking and carrying away of the goods and chattels, as to which they found him not guilty; damages five shillings. And the judge, who tried the cause, did not certify that the assault and battery were proved, or that the freehold or title was in question. The plaintiff having had full costs taxed by the prothonotary, the defendant, upon motion, obtained a rule to shew cause why the said taxation should not be set aside.

Willes, Lord *Chief Justice*,—(as far as is material to be stated) delivered his opinion to the following effect:—In giving my opinion in this case, that the plaintiff is entitled to full costs without a certificate from the judge, upon the st

and 23 *Car.* 2. I do not at all rely upon an *asportavit*, or the spoliation of a chattel, but lay them quite out of the case. What I rely upon is, that the plaintiff in no case, where the damages are under forty shillings, needs the certificate of a judge to entitle him to full costs, but either in actions of assault and battery, or trespass *quare clausum fregit*, which is the foundation of the judgments in the cases of *Venn* v. *Philips* (*a*) and *Thomson* v. *Berry* (*b*), on both which cases I found myself. After the statute 22 and 23 *Car.* 2. the plaintiff cannot have full costs, where his damages are under forty shillings, in *assault and battery* and *clausum fregit*, unless the judge certify pursuant to that statute; but as to all other personal actions, wherein there can be no certificate upon this act of parliament, as debt, *assumpsit*, trover, trespass for spoiling his goods, or taking his goods, &c. (*c*) there the plaintiff, though his damages are found under forty shillings, shall be entitled to full costs by the statute of *Gloucester*; but if the judge should deem the suit very frivolous and vexatious, he may deprive the plaintiff of the benefit of the statute of *Gloucester*, by certifying upon that of 43 *Eliz.* c. 6; and I hope that that good statute will be put in use, as I have led the way by certifying upon it, very lately.

(*a*) Salk. 208.
(*b*) 1 Str. 551. S. C. cit. in Gilb. Eq. Rep. 197.
(*c*) except in actions for slanderous words.
Vide ante.

It is objected that the plaintiff ought not to have full costs, because part of the verdict is within the statute 22 and 23 *Car.* 2, and that although the breaking the standard and roller is out of that statute, and the plaintiff might have had full costs upon *that*, without any certificate, yet the *assault*, *battery*, and *wounding*, are expressly within the act, and therefore, there ought to have been a certificate that these

were sufficiently proved, and for want thereof, the damages being under forty shillings, the plaintiff cannot have more costs than damages;—but I am of opinion that *that* will not alter the case, and the plaintiff must have full costs, without a certificate, notwithstanding the finding of the *assault*, *battery*, and *wounding*; for as the defendant is found guilty of other things in the declaration for which the plaintiff is clearly entitled to full costs, the finding as to the *assault* and *battery* makes no alteration.

I FOUND my opinion upon the reason in *Venn* v. *Philips*, and *Thompson* v. *Berry*, without regard to *asportavit* or *spoliation*, which is, that there is no case within the statute 22 and 23 *Car.* 2, but trespass *quare clausum fregit*, and *assault and battery*, and that in all other cases a plaintiff, who recovers, upon a personal action, damages under forty shillings, is entitled to full costs under the statute of *Gloucester*, without any certificate upon that of *Car.* 2, unless he is excluded that benefit by a certificate upon the 43 *Eliz.* c. 6, therefore, in my opinion, the plaintiff is here entitled to full costs.

ABNEY, *Justice*, of the same opinion.

BURNET, *Justice*.—I am of opinion that the plaintiff is entitled to full costs. The defendant is found guilty of the *assault*, *battery*, and *wounding*, and also of *treading upon and spoiling the coals*, and *breaking*, *and spoiling the standard and roller of the plaintiff*.

AFTER stating and observing upon the statutes of 43 *Eliz.*

c. 6. and 22 and 23 *Car.* 2, he proceeded thus,—an objection hath been made, that, in this case, the cause of action is part of it *within* and part of it *out* of the last mentioned statute. The *assault* and *battery*, found by the verdict, are clearly *within* the statute, and if nothing more had been found by the jury, a certificate would have been requisite to give full costs to the plaintiff; but here is likewise a trespass found upon a *personal chattel*, which is not included under the statute, and if the verdict had found the defendant guilty of this part of the charge only, no certificate would have been necessary to entitle the plaintiff to full costs, though his damages might not have amounted to forty shillings.

And I am also of opinion, that, although this verdict finds one trespass *within* the statute, and another *out* of it, yet the plaintiff is entitled to full costs, although there be neither a certificate, nor damages found to the amount of forty shillings; and I go upon this foundation, that such a construction will be for the benefit of the defendant; for the plaintiff is less vexatious by including all the injuries in one action,—he might have separated his causes of action, and divided them into two suits, so that the defendant, as he hath been found guilty of the whole declaration, might have had to pay the costs of two actions; in one action, without a certificate; and in the other with a certificate; whereas here he will, upon our construction, only pay the costs of one action; and he cited the reasoning of the Court in the case of *Lately* v. *Fry*, as applicable to this point. Com. Rep. 19, 20.

There being a *spoliation* in this case, upon which the

party might have brought his separate action, and have recovered full costs without a certificate, I am of opinion that the plaintiff is entitled to full costs. Rule, for setting aside the taxation of full costs for the plaintiff, discharged.

It has been resolved in the Court of King's Bench, that there shall be no more costs than damages, (should the latter be found under forty shillings) without a certificate, in an action of assault and battery, and *for tearing or injuring the plaintiff's clothes*, if the tearing or other injury, be *charged in the declaration*, or *found by the jury*, to have been *in consequence* of the beating. But the reasoning and principles, on which the Court of King's Bench grounded the decisions alluded to, (*Hampson* v. *Adshead* and *Cotterill* v. *Tolly*) furnish a strong inference, that that court would deem a certificate not requisite to give a title to full costs, on a general verdict for the plaintiff, where, in such an action, the tearing or damaging the clothes is laid in the declaration *as a distinct and substantive fact*, and not *as a consequence* of the beating; even though such charge should be contained in the same count with the injury to the plaintiff's person. The case of *Carruthers* v. *Lamb*, determined by the Common Pleas, must have been decided on the same distinction. But in two modern determinations, that court appear to have contradicted this doctrine; at least, in a very great degree. The following are the cases of the respective courts on the subject.

Post. 55, 56.

Infra.

Carruthers v. Lamb C. B. M. 8 G. 2. Barnes 120. S. C. Cas. Pr. C. P. 108.

In an action of trespass, for an assault, battery, *and tearing and spoiling the clothes* of the plaintiff, *with which he was then clothed*, a general verdict was found for the

plaintiff, damages one penny. And, though the judge had not certified that an assault and battery were proved, it was holden, by the judges in the Treasury, that the plaintiff should have full costs. And it was said, that this was not a case within the statute 22 and 23 *Car.* 2, because the tearing the clothes, which was joined with the assault and battery, was founded on an injury to the property of the plaintiff, for whom there was a general verdict.

Hampson v. Adshead B. R. T. 27 G. 2. Say. 91. S. C. Bull. N. P. 329.

A SIMILAR question arose, in a subsequent case, in the Court of King's Bench; which was as follows; in an action of trespass, the plaintiff declared in the same count, that the defendant made an assault on him and beat him, and then and there pushed him down on the ground, the said ground being covered with water, and *thereby* wetting and spoiling his coat, whereby he became sick and weak, &c. A general verdict was found for the plaintiff with twenty shillings damages, and there was no certificate of the sufficient proof of a battery. The sole question was, whether the plaintiff had or had not, under the above circumstances, a right to full costs? and the Court held that he had *not*, because the wetting of the clothes was not a distinct thing from the assault, but laid as a consequence of it; it was an injury arising from the original cause of action.

AND by LEE, *Chief Justice*.—The damaging of the clothes is charged in this declaration, as a consequence of the assault and battery, and cannot be so separated therefrom, as to make it an independent injury to a personal chattel. And DENISON, *Justice*, said, the word *thereby* means the same

as the words *per quod*, and it has been frequently holden, that a plaintiff in an action of trespass is not entitled to full costs for an injury to a personal chattel laid with a *per quod*, unless damages are found to the amount of forty shillings, or there be a certificate. If it had been alleged that the defendant threw water upon the plaintiff's clothes, and that the clothes were thereby damaged, the plaintiff would have been entitled to full costs; because the throwing of the water upon the clothes would, in that case, have been an independent injury to a personal chattel.

In the following case Mr. *Justice* Buller was of opinion that the declaration was sufficient to carry full costs, if the plaintiff had obtained a general verdict, because, he said, the tearing, &c. was laid therein as a substantive fact; but the jury having expressly found the tearing to be merely *consequential* to the beating; the Court refused more costs than damages.

Cotterill v. Tolly B. R. P. 27 G. 3. 1 Term Rep. 555.

In this case, which was an action of assault and battery, wherein the declaration, after stating the assault, stated in the same count, that the defendant *then and there tore, rent*, &c. the clothes of the plaintiff, the jury found a verdict for the plaintiff with one shilling damages; and they also found, upon being asked by Grose, *Justice, that the clothes were torn in consequence of the beating*. It was moved that the master might tax the plaintiff his costs, and the distinction, as laid down in the case of *Hampson* v. *Adsbead*, between laying the tearing of the clothes as *a consequence* of the beating, and as a *substantive allegation*, on a general verdict for the

plaintiff, was stated at the bar; and it was said, that, in this case, the trespass must be considered as a substantive charge, because it was so laid; and the finding of the jury did not vary the case, because they had no right to find the fact in a different manner from that in which it was laid; and if they had intended to acquit the defendant of that part of the charge, they should have found him not guilty as to that part.

Ashurst, *Justice*.—The rule is, that wherever the tearing the plaintiff's clothes is merely *consequential* to the beating, the plaintiff is not entitled to more costs than damages, unless the jury find to the amount of forty shillings damages. Now, here it is expressly found that the tearing was in consequence of the beating; therefore the plaintiff is not entitled to his costs.

Buller, *Justice*.—The declaration in this case is sufficient to carry the costs, because the tearing, &c. is laid as a substantive fact. But the plaintiff must recover *secundum allegata et probata*. If the jury had found the truth of the allegation, the plaintiff would have been entitled to his full costs: but they have negatived that part of the count, because they have found the tearing to have been *in consequence* of the beating, and the Court are bound by that finding; though it would have been more correct if they had found the defendant not guilty as to that part.

Grose, *Justice*.—I left it to the jury to consider whether the tearing was in consequence of the beating, who found that it was. It was then left to the defendant's counsel to endorse

the *postea* in such a manner, as to exclude the plaintiff from having his costs.—Rule refused.

THE Court of Common Pleas, in the two subsequent decisions, appear to have differed from the Court of King's Bench with respect to what shall be deemed, in an action of assault and battery, a sufficient mode of laying or stating a damage or injury to the plaintiff's clothes, as a distinct and substantive allegation, in the declaration; so as to carry full costs, without a certificate, on a general verdict for the plaintiff and damages under forty shillings.

Atkinson v. Jackson, C. B. P. 26 G. 3. cited Bl. Term Rep. 295.

THUS, in an action of assault and battery, wherein the declaration stated, that the defendant struck the plaintiff many violent blows, "and flung and threw a large quantity of wa-"ter upon and over the plaintiff, and then and there not "only wetted him, and put him in danger of catching cold, "but spoiled his clothes," &c. jury found for the plaintiff, with under forty shillings damages, and the judge granted no certificate. Motion to tax the plaintiff his full costs.

LORD LOUGHBOROUGH, said, there was much perplexity in motions of this sort, but the sense seemed to him to be, that where the jury do not find forty shillings damages, there should be no more costs than damages. And GOULD, *Justice*, observed, that the throwing the water, and then and there spoiling the clothes, tied the whole count and complaint together. And the rule was refused.

Mears v. Greenaway, C.

AGAIN, in an action of trespass, for an assault and bat-

ry, the first count in the declaration, after stating, in the ual manner, the assault and battery upon the plaintiff, pro- eeded thus.—"*And the said defendant then and there tore, rent, spoiled, damaged and destroyed the clothes and wearing apparel of the said plaintiff, to wit, two coats, two waistcoats, one pair of breeches, one hat, one wig, &c. &c.* (particularizing the different articles of dress) *wherewith he was then and there clothed, and which he then and there had on, of the value of twenty pounds, so that they became of no use or value to him the said plaintiff.*" There were two more counts, which only differed om this, in omitting the spoiling of the clothes. The de- ndant pleaded the general issue, and, at the trial, a verdict as found for the plaintiff, with five shillings damages; but e judge did not certify. The prothonotary having allowed ll costs to the plaintiff, a rule was obtained to shew cause hy he should not review his taxation.

B. M. 30 G. 3. Bl. Term Rep. 291.

On shewing cause against the rule, it was insisted, that he plaintiff in the present case, was entitled to full costs, al- hough the damages were under forty shillings, and the judge ad granted no certificate of the proof of an assault and bat- ery, because an injury was charged to be done to the per- onal chattels of the plaintiff, and a general verdict found. The defendant might have had a finding which would ne- gative that charge; the plaintiff could only have a general erdict: it must now, therefore, be taken, that the defendant as proved to have done the injury with which he was harged. It is a distinct substantive allegation, though not contained in separate counts. And, in support of this doctrine,

were cited the cases of *Thompson* v. *Berry*, 1 *Str.* 551. *Arnold* v. *Thompson*, Barnes, 119. *Carruthers* v. *Lamb*, *Hampson* v. *Adshead*, and Mr. *Justice* BULLER's opinion in *Cotterill* v. *Tolly*.

Supra. 54, 55. 57.

ON the other side, in support of the rule, it was said, that there was no authority to shew that, on a declaration framed like the present, the tearing would entitle the plaintiff to full costs; it states the clothes to have been on the back of the plaintiff; the tearing of them was, therefore, of itself a battery, or, at least, was necessarily preceded by a battery, since the plaintiff had the clothes on. The judge might therefore have certified an actual battery sufficiently proved.

LORD LOUGHBOROUGH.—There is no doubt in this case, that the same question might have been left to the jury, which my brother GROSE asked them in the case of *Cotterill*, v. *Tolly*, namely, whether the tearing the clothes were part of the same act for which they gave five shillings damages? if they had answered that it was so, there would have been no question. But it is the same thing, if it appear on the face of the declaration; which, after stating the beating, goes on to state, that the clothes of the plaintiff were spoiled, and then specifies each particular article, his coat, waistcoat, hat, wig, shoes, stockings, &c. Now I can only conceive one case in which, by any reasonable probability, these acts can be considered as wholly distinct; and that is by supposing that the defendant had first beat the plaintiff, then stripped him stark naked, and spoiled his clothes. But it is evident

that one act was in consequence of the other; and the law is not to be evaded by a device in pleading.

GOULD, *Justice*.—There are two courses marked out for judges in cases of this kind, one by the statute 43 *Eliz.* the other by 22 and 23 *Car.* 2. The first, and best determination is in 3 *Keble*, but that has been open to a great deal of subtle reasoning and distinction. Yet, I think *that* the best construction, which best answers the end of the legislature, and puts a stop to all frivolous actions, by restraining more costs than damages from being allowed, except in the cases specified. If therefore the declaration states the tearing of the clothes to be done at the same time with the beating, the Court will construe it so as to accomplish the object of the statute, and will hold the tearing to be part of the same act, and a consequence of the battery. It was well determined in the case in (*a*) 4 Co. that the words *adtunc et ibidem*, united and coupled all together.

Semb. Brown v. Taylor, B. R. P. 24 Car. 2. 3 Keb. 31.

(*a*) Walker's *case*, 4 Co. 41. b.

HEATH, *Justice*,—of the same opinion. Whatever difference of construction there was formerly on the statute of *Car.* 2, it is now settled, that it must either appear on the face of the declaration, or be found by the jury, that the tearing the clothes is a consequence of the beating. But after a general verdict it is to be intended that it was so found; and this may be without violence to the cases determined in the King's Bench.

WILSON, *Justice*,—of the same opinion, that there should not be full costs. The cases rest on the form of the decla-

ration. If in an action of this kind, the party chooses to forego the *tort* to his person, and goes only for the injury to his clothes, he would have his full costs. But if he will combine both together in one count, the case is within the statute *Car.* 2, because the principal injury is the battery; and the judge may certify. Rule absolute.

It should seem, from these resolutions, that, in whatever shape an injury, or damage to the plaintiff's clothes, wherewith he was attired, be charged in the declaration in an action of assault and battery, the plaintiff will, in no case, in the Court of Common Pleas, be entitled to full costs on a general verdict in his favour, if the damages are found under forty shillings, and the judge have omitted to certify that an assault and battery were sufficiently proved; at least where the injury to the clothes is charged in the same count with the injury to the person of the plaintiff, and to have been committed at the same time and place.

2 Keb. 849. Richards v. Turner, C. B. T. 6 G. Bull. N. P. 330.

Although some doubt appears to have been entertained upon the point formerly, yet it seems now clearly agreed, that no certificate is requisite to entitle the plaintiff to full costs, however small the damages may be, where the defendant pleads a justification in an action of assault and battery, which is found against him. For such justification admits the battery, and is therefore equivalent to a certificate of the proof of that fact. But if the defendant justify, and thereupon the plaintiff make a new assignment, to which the defendant pleads the general issue, the plaintiff will have no more costs than damages without a certificate.

In the case of *Wasber* v. *Smith*, it was agreed, that as the plea of *son assault demesne* expressly admits a battery, wherever it is pleaded and found for the plaintiff, there shall be full costs without a certificate. 2 Barnard, K. B. 277. S. P. 6 Vin. Abr. Tit. Costs. 332. pl. 38.

In *Wasber* v. *Smith*, which was an action of assault and battery, the defendant pleaded *molliter manus imposuit* upon the plaintiff, to turn him out of the defendant's garden. The plaintiff obtained a verdict, damages under forty shillings, but the judge did not certify. It was insisted for the plaintiff, that a certificate from the judge was, in this case, unnecessary, since the defendant's plea amounted to an admission of the assault and battery. On the other side, it was said, that there is no occasion for a certificate, where *son assault demesne* is pleaded, because that confesses the battery, but here the *battery is denied*, and the special pleadings go only to the *assault*. Lee, *Justice*, inclined to be of this latter opinion, and doubted whether the battery was confessed in this case; but the *Chief Justice* (Lord Raymond), and Page, *Justice*, inclined to be of a different opinion, and Mr. *Justice* Page said, that he remembered that Lord Holt would allow a smart beating to be admitted on this plea. The point, however, was adjourned, and does not appear to have been ever decided. Washer v. Smith and Wife. B. R. M. 6 G. 2. 2 Barnard, K. B. 180. 277. S. C. 2 Kel. 93.

But, if the defendant justify the *assault* only, the plaintiff cannot have full costs without a certificate, should the damages be found under forty shillings.

Thus, in an action of trespass for an assault and battery, Page v. Creed,

B. R. T. 29 G. 3. 3 Term Rep. 391.

the defendant pleaded the general issue to the whole, and a plea of justification as to the *assault only*. Replication *de injuriâ suâ propriâ*, &c. And, on the trial, a verdict was entered for the plaintiff, with damages one shilling, and costs forty shillings. A rule was obtained to shew cause why the forty shillings costs should not be reduced to one shilling. On shewing cause, it was admitted that the jury had not really found forty shillings costs, but that the entry was made by the officer by mistake. So that the only question was, whether the plaintiff was entitled to any more costs than damages?

By the Court.—This question must be determined by the statute 22 and 23 *Car.* 2. c. 9. which enacts that, in actions of trespass, assault, and battery, wherein the judge shall not certify that an assault and battery were proved, in case the jury shall find the damages to be under forty shillings, the plaintiff shall recover no more costs than damages. It is true, that if a plea of justification extend to the battery, as well as the assault, it has been held that no certificate is necessary, the justification being tantamount to it. But here the battery is not justified; neither is there any certificate that a battery was proved; therefore this case falls within the meaning of the statute of *Car.* 2, and the plaintiff is entitled to no more costs than damages.

Of Costs in Actions of Trespass, under the Statute 22 *and* 23 *Car.* 2. c. 9.

We come now to consider the cases which have been agitated upon the other division of the statute, relative to actions

of trespass, where the freehold or title of land either actually was, or might have come in question. The observation, made by Lord MANSFIELD, in *Clegg* v. *Molyneux*, that there is a puzzle and perplexity in the cases upon this part of the statute of *Car.* 2, and a jumble in the reports, appears to be fully warranted by the fact. These cases are of an infinite variety; and the determinations, in many of them, are grounded upon, and supported by such subtle and refined distinctions and reasoning, as perhaps render it sometimes a difficult task to form a decisive opinion upon questions on this point, that have, more than once, been the subjects of judicial disquisition. An attempt, however successful, will be made to methodize and arrange those decisions. Doug. 780.

IT hath been observed, in a preceding part of this section, that, notwithstanding the words "*other personal actions*," made use of in the statute of *Car.* 2, the construction put upon that act of parliament, hath extended it only to actions of trespass *quare clausum fregit*, that is, to actions where the freehold, or title of the land may by presumption or possibility come in question. Hence, in cases where such freehold or title in an action of trespass *quare clausum fregit*, *might* come in question, the plaintiff will be entitled to no more costs than damages, if the latter are not found by the verdict to the amount of forty shillings, unless the judge, at the trial of the cause, shall certify, pursuant to the statute, that such freehold or title *was* chiefly in question.

THUS, in an action of trespass *quare clausum fregit*, and putting stakes upon the plaintiff's ground, it was holden, Anon. C. B. T. 1 W. and M. 2 Vent. 48.

that there should be no more costs than damages, without a certificate. Nor, in trespass for breaking his close, and cutting his rails, for they are fixed to the freehold.

PerHolt, Ch. J. Comb. 324.

So, in an action of trespass, wherein the declaration suggested several trespasses, and among others, the turning up the soil with ploughs, &c. it was resolved, on a verdict for the plaintiff with under forty shillings damages, and no certificate, that there should *not* be full costs.

Smithsend v. Long T. 10 Ann. Cas. Pr. C. P. 2. S. P. Hazeltine v. Kirkhouse P. 2 G. 2. Ibid. 3. Vide Reynolds v. Osborn 5 Mod. 74. which was trespass for breaking his close, and breaking the soil, and the point adjourned; and a case cited by Rokerby, J. semb. cont. et vide 5 Mod. 316 contra arg.

So in trespass, *inter alia*, for breaking the plaintiff's lock upon his gate, the Court denied more costs than damages, because the judge had not certified; and they said if it had been for taking away the lock, full costs might have been given; but, by Powell, *J.* this seems to be laid as a trespass in order to try the title.

Butler v. Cozens B. R. M. 7 Ann. 11 Mod. 198. It was held within the statute, for the locks were fixed to the posts, and the posts to the freehold. S. C. 6. Vin. Abr. 357 Marg. cites Lane v. Brown, H. 12 Anne.

So, where the verdict found the defendant guilty of trespassing with cattle, and of breaking and prostrating the hedges and fences of the plaintiff, and a penny damages, costs *de incremento* were refused, there being no certificate.

Mitchel v. Soaper, In Scacc. Bunb. 167. Comb. 420. acc.

The same point was ruled accordingly, where an action of trespass was brought for breaking and entering the plaintiff's close, and cutting down, lopping, and spoiling trees there growing, and the plaintiff recovered a verdict, and two-pence damages.

Hill v. Reeves, C. B. P. 3 G. 1. Bull. N. P. 329. S. P. Shepherd and Yard, C. B. 2 Com. Dig. 545.

AGAIN, in trespass for breaking and entering a house, breaking down the window-shutters, and breaking to pieces and spoiling the bolt belonging to the window-shutters, the plaintiff, having obtained a verdict with only one shilling damages, was allowed no more costs than damages, as the judge had not certified.

Birch v. Daffey C. B. T. 3 G. 1. Bull. N. P. 330. S. C. Pract. Reg. 107. Acc. Beck v. Nicholls, C. B. M. 10 G. 1. 1 Str. 577. S. C. Gilb. Eq. Rep. 197. Cas. Pr. C. P. 24. ante p. 49.

So, in an action of trespass *quare clausum fregit*, and erecting a wall upon the plaintiff's ground, by the opinion of Lord *Chief Justice* RAYMOND, and REYNOLDS, *Justice*, there ought to be no more costs than damages, except the damages amount to forty shillings, without a certificate.

Higgins v. Jennings, B. R. M. 13 G. 1. 2 Ld. Raym. 1444.

THE same point resolved, where, in trespass for breaking his close, and grazing the herbage with cattle, and subverting the soil with ploughs, digging therein, and obstructing his watercourse, by which his close was overflowed, there was a verdict for plaintiff and two-pence damages.

Laver v. Hobbs B. R. P. 4 W. & M. Carth. 224.

So, in another case, where, in an action of trespass for breaking the plaintiff's close, and cutting down his corn there growing, and taking and carrying the same away, the defendant was found guilty only of the cutting the corn, and not guilty of the carrying it away, the Court strongly inclined to be of opinion, that the plaintiff should not have full costs, there being no certificate; but the question was adjourned.

Blachley v. Fry B. R. M. 8 W. 3. Salk. 193. S. C. Skin. 666. Comb. 399. 5 Mod. 315. Com. 19. Semb. S. C. by the name of Lately v. Fry.

THE plaintiff declared in trespass for breaking and entering his close with cattle, and bruizing, pressing, and spoiling his apples there *found*, and obtained a verdict with small da-

Gregory v. Dormer M. 26 G. 2. Barnes 144.

mages, under the sum of forty shillings; and it was ruled that, since the judge had granted no certificate, there could be no more costs than damages; and by the Court, the apples, for ought that appears to the contrary on the face of the declaration, might be *growing*, though stated to be *there found*.

Dixie Bart. v. Somerfield H. 6 G. 2. Cas. Pr. C. P. 86.

So, where, in an action of trespass, the declaration was for breaking his close, and with pick-axes, &c. digging up and subverting the soil, and breaking, prostrating, and destroying his pales, rails, and gates there fixed and erected, to the value, &c, a certificate was holden requisite to entitle the plaintiff to full costs, the damages being under forty shillings; for the freehold might have come in question.

Tomlinson v. White, P. 8 G. 2. Barnes 121. S. C. Cas. Pr. C. P. 117.

AGAIN, in an action of trespass, for breaking and entering plaintiff's house, and breaking his cellar-door, the jury found for the plaintiff as to breaking the door, damages sixpence, and the residue for the defendant; for want of a certificate the plaintiff was allowed no more costs than damages, because the door was fixed to the freehold, and no personal chattel, and consequently the title to the freehold might have come in question.

Blunt v. Mither C. B. M. 12 G. 1. 1 Str. 645. S. C. cited Gilb. Eq. Rep. 197.

So, in trespass for breaking and entering the plaintiff's house, and keeping him out of the use of the house, with a *continuando* for a month, whereby the plaintiff was put to great expences to regain the possession, and in the mean time lost the profit and use of it, the plaintiff shall only have the same costs as damages, in case the damages are found

under forty shillings, and the judge have omitted to certify, for this is a plain trespass *quare clausum fregit*, and the *per quod* only aggravation; the title might have been in question.

Appleton v. Smith, B. R. H. 2 G. 3. 3 Burr. 1282.

In a subsequent case the question was, whether the plaintiff should have *full costs*, or *no more costs than damages*, under the following circumstances; this was an action of trespass *vi et armis*, for breaking and entering the plaintiff's dwelling house, and there making a great noise, affray, and disturbance, and continuing it for two hours, and *until* the plaintiff and his father, *Richard Appleton* the elder, and one *Christopher Atkins* were compelled and obliged to give, and did give the defendant their promissory note for 61. 17s. payable to him the said defendant. The jury found for the plaintiff, and gave him *a guinea* damages, but there was no certificate from the judge that the freehold or title was in question.

Lord Mansfield.—This case depends upon the words, "and *until* the plaintiff, &c. were compelled, &c.;" which words are barely an *aggravation* of the defendant's continuing in the house; and nothing more. On the *first* words, (*viz.* "breaking and entering the house,") the freehold *might* have come in question.

Mr. *Justice* Denison concurred that they are *only words of aggravation*; which need not even be answered in a plea. The Court (*absente* Foster, *Justice*) directed the master to tax the costs at *a guinea only*.

FROM the above cases it is abundantly evident, that a certificate from the judge, who tried the cause, that the freehold or title to the land mentioned in the declaration was in question, is absolutely necessary to constitute a title to full costs, in all actions of trespass *quare clausum fregit*, (in which the damages found do not amount to forty shillings) where the freehold or title, for any thing that appears to the contrary on the declaration, *might* be the subject of litigation; notwithstanding a further injury be charged to something *fixed to the freehold*, or any other circumstances laid barely as *an aggravation* or *as a consequence* of the principal trespass to the freehold or land.

Vide 3 Wils. 327. Gilb. H. C. P. 263.

HENCE also, as the operation of the statute is confined to cases where it is practicable for the judge to certify the title to have been in question, it is obvious that if it appear, from the pleadings in the cause, or the nature of the case, to be impossible that any question relating to the freehold or title of land, could be discussed, the plaintiff is entitled to full costs, however small the damages may be; that not being a case within the statute of 22 and 23 *Car.* 2.

Styleman v. Patrick, C. B. M. 28 Car. 2. 1 Freem. 214. S. C. 2 Mod. 141.

THUS, in an action upon the case, by a commoner against defendant for turning his sheep upon the common, so that the plaintiff could not enjoy his right of common *in tam amplo*, &c. the plaintiff obtained a verdict with ten shillings damages; this was resolved not to be a case within the statute of *Car.* 2, since by no possibility could the title of the land come in question, and the plaintiff was allowed full costs, by

the opinions of NORTH, *Chief Justice*, and WYNDHAM and SCROGGS, *Justices*, against that of ATKINS, *Justice*; who thought the case within the statute; for although, he said, the title of the land could not come in question, yet common is concerning land, and a man may have freehold in it.

So where the plaintiff declared, in an action of trespass, for breaking and entering his free warren in *Aveley* in the county of *Essex*, and chasing, hunting, and killing divers foxes, hares, conies, partridges, and pheasants of the plaintiff, and taking away other his goods and chattels. Plea, not guilty. On the trial the defendant was found guilty of breaking and entering the free warren of the plaintiff, and chasing and hunting one hare, damages, six-pence, and not guilty as to the residue.

Lord Dacre v. Tebb, C. B. P. 17 G. 3. 2 Blackst. 1151.

A MOTION was made that the prothonotary might tax full costs for the plaintiff. For which purpose it was alleged that this was not a case within the statute of *Car.* 2, because here there could not possibly be any question relating to the *land*, but merely to the franchise of *free warren*. For the defendant it was insisted, that it was possible the freehold or title to the land might be so interwoven with the title to the free warren, that both might come in question. And where the freehold *might* come in question, but did not, and the damages are under forty shillings, there shall be no more costs than damages.

GOULD, *Justice*.—I think the act of parliament is confined to such actions of trespass, where the soil or land is

mentioned in the declaration as the subject of the trespa complained of. The right of free warren was not in the contemplation of the legislature.

BLACKSTONE, *Justice.*—Of the same opinion. In actions instituted merely for breaking free warren, it is impossible the title of the *soil* can ever come in question; for though both may concur in one person, yet the title to the free warren is always collateral to that of the land; for a man may have free warren *in alieno solo.* Besides the hare so hunted was the personal property of the owner of the free warren; and if any injury be done to personal property, that will take it out of the statute, and entitle the plaintiff to full costs.

NARES, *Justice.*—Of the same opinion. DE GREY, *Chief Justice,* absent. Rule absolute for taxing the plaintiff full costs.

So in an action of trespass, *vi et armis,* (*a*) for breaking, throwing down, overturning, and spoiling the stalls of the plaintiff erected in the market-place of *H.*—(*b*) for taking away two of the plaintiff's sheep;—(*c*) for chasing, driving and wounding his sheep, *per quod* some died, and others were damnified; and also for taking and carrying away one hog of the plaintiff's, where the jury found the defendant guilty of all but the taking and carrying away of the hog, of which they found him not guilty;—(*d*) for chasing his cow and his domestic fowls, *viz.* hens, geese, &c. with dogs, which dogs were used to bite tame fowl, by whose biting they were killed;—(*e*) for chasing his sheep, and that he (the defen-

(*a*) Smith v. Betterton 2 Jones 232, S. C. Raym. 487. Skin. 100. 2 Show. 258.
(*b*) Orpwood v. Holden, 3 Keb. 389. contra Ibid. 247.
(*c*) Ven v. Philips. Salk. 208.
(*d*) Keen v. Whistler, 1 Str. 534. S.C. cited Gilb. Eq. Rep. 197.
(*e*) Colethurst v. Hayes, Carth. 225.

dant) *ad loca ignota eos abduxit et elongavit*;—(*f*) for pushing the tap out of a barrel, by means whereof the beer was spilt;—(*g*) for breaking a water-pail;—(*h*) for killing a goose;—(*i*) for taking the plaintiff's horse and sending and conveying him from *H.* to *G.*;—in actions of debt, *assumpsit*, trover, trespass *de bonis asportatis*, (*of goods not fixed to the freehold*) and, in short, in all other personal actions whatsoever, (except actions of slander and assault and battery, which have been already treated of at large) where, from the nature of things, it is impossible that the freehold or title should, or could have been in question,—the plaintiff is not precluded from recovering *full* costs, in any shape, by the operation of the statute of *Car.* 2, if he recover *any* damages, howsoever *small* the amount may be. However, although a plaintiff's right to full costs, is not in the preceding cases, affected, in any manner, by the statute of *Car.* 2, such right is not indefeasible; since, we may remember, that, in all personal actions, not being for any *battery*, nor *any title of land*, nor (now) for *slanderous words*, a judge has it in his power, where the damages are under forty shillings, to obstruct full costs, if he conceive the action to be extremely frivolous and vexatious, by certifying upon the *postea*, in pursuance of the statute 43 *Eliz.* c. 6.—that the damages to be recovered do not exceed forty shillings.

(*f*) Rositer v. Bolting, Cas. Pr. C. P. 24.
(*g*) Parke v. Davis, Ibid. 49.
(*h*) Blackboyne v. Packer, cit. Ibid. 49.
(*i*) Harper v. Jiffer, B. R. H. 375. Vide Comb. 75.

Upon the same principle, a plaintiff shall have *full* costs in an action of trespass *quare clausum fregit*,—wherein the declaration contains several counts, one of which relates to a trespass upon land, in which the title might have come in question, and another charges an injury to, or *asportavit* of

Gilb. Eq. Rep. 196.
Bunb. 208.
Gilb. H. C. P. 263.

a personal chattel, where the freehold or title could not possibly be in question;—should a general verdict with entire damages be found for him; though there be neither a certificate from the judge, nor damages to the amount of forty shillings. And the reason is, that there being a general verdict, some of the damages must be proportioned and applied to the second count, which is grounded upon an injury to mere personalty, utterly unconnected with, and independent of any question relative to the freehold or title, and consequently, upon *that* count, it was impossible for the judge to grant the certificate prescribed by the statute of 22 and 23 *Car.* 2.

Barnes v. Edgard, B. R. H. 35 Car. 2. 3 Mod. 39.

THUS, in an action of trespass for breaking his close, and *impounding his cattle*, the plaintiff having, upon not guilty pleaded, obtained a general verdict with under forty shillings damages, it was holden that he was entitled to full costs; the defendant being found guilty of the whole declaration, one of the counts whereof was for his impounding of the plaintiff's cattle.

Knightly v. Buxton, B. R. H. 23 G. 2. Say. on Costs, 89.

AND again, in an action of trespass, wherein the declaration contained one count for a trespass upon land, and another for taking and carrying away a hog, upon a *general* verdict, with damages under forty shillings, the plaintiff was allowed full costs without a certificate. And the same principle attaches, in some cases, where an *asportavit* of property is joined in the *same* count with a trespass upon land, and a general verdict is found for the plaintiff. But some contrariety and confusion prevail in the cases on this subject,

Vide Bull. N. P. 329. Gilb. H. C. P. 263.

not only with respect to what is, or is not, but likewise with respect to the subject matter of such an asportation as will, when contained in one and the same count with a trespass upon land, entitle a plaintiff to full costs, on a general verdict in his favour, however trifling the damages may be, without a certificate.

Anon. C. B. M. 2 W. & M. 2 Vent. 215.

In an action of trespass *quare clausum fregit*, and digging up and carrying away of his trees, it appeared in evidence, that the defendant had entered into the plaintiff's close, and dug up several roots of his trees, and removed them about two yards from the place where they were dug up, to a different part of the same ground. The jury gave damages under forty shillings, and the judge did not certify. It was resolved by Pollexfen, *Chief Justice*, and Rokeby, *Justice*, (against the opinion of Ventris, *Justice*,) that the plaintiff should have full costs, because the roots were carried *from the place where they were dug*, though *not* removed entirely from off the ground.

Skin. 666. S. C. of Blachley v. Fry, rep. in Salk. 193. Comb. 399. 5 Mod. 315, but S. P. not noticed.

And in one report of the case of *Blachley* v. *Fry*, which was trespass for breaking his close, and cutting and taking away his corn, and the defendant found guilty of the whole trespass, but carrying away the corn, as to which he was acquitted, the Court are made to say, that if the defendant had been found guilty of carrying the corn away, though not from off the premises, the plaintiff would have been entitled to full costs.

But from the later resolutions on this point, it should

seem that an asportation, to give a title to full costs, should be an *absolute and entire removal* of the property *from the land of the owner*, and not a partial conveyance of it to another part of the premises.

Franklin v. Jolland, B. R. H. 8 W. 3. Cited 1 Str. 684.

THUS, in trespass for breaking and entering the plaintiff's close, and eating his herbs, and *for pulling up and throwing down three perches of hedge* lately erected, there was a verdict found for the plaintiff, and five shillings damages. Motion for full costs, (notwithstanding the judge had not certified) on the ground that there was an asportation laid in the declaration, *viz.* pulling up and throwing down the hedge, which could not be done without some asportation; but by HOLT, *Chief Justice*, and the Court, by asportation is meant a carrying quite away, and not such an asportation as this; so the motion was denied.

Anon. C. B. T. 11 G. 1. 1. Str. 633. S. C. Gilb. Eq. Rep. 198.

IN a subsequent case, the question was whether *the breaking down, tearing up and spoiling of five poles*, erected and affixed in the plaintiff's close, amounted to an asportation; and it was resolved that these words imported no asportation, which must be an entire carrying away. In support of this doctrine the Court relied on the above case of *Franklin v. Jolland*, and expressed themselves dissatisfied with the resolution in 2 *Vent.* 215.

IN a late resolution by the Court of King's Bench, it was held that, if what is laid in the declaration as an *asportavit* amount to nothing more than a description of the mode in which the injury to the land was effected, and is laid as

part and a continuation of the same act, a certificate, although the plaintiff obtains a general verdict, is requisite to entitle him to full costs, except the damages should be found to the amount of forty shillings. And the reasoning in the case alluded to appears strongly to affect the authority of that reported in (1) 2 *Vent.* 215, even if *an absolute asportation* had existed there.

(1) In the case reported in 2 *Vent.* 215. *Pollexfen* and *Rokeby*, Justices, held that the removal of the roots to a different part of the premises, from that where they were dug up, amounted to a sufficient *asportation* to carry full costs, by analogy to the case of felony, where, they said, a bare removal of goods from the place in which they were found, with a felonious intent to steal them, constituted the crime of felony. This notion is certainly just, where such felonious taking and carrying away is merely *of the personal goods of another*,—no way *annexed to the freehold*: for if they are things *real* or savour of the realty, larceny at the common law cannot be committed of them. And, by the rules of the common law, it was no larceny, but a bare trespass, to steal things adherent to the freehold, such as corn, grass, trees, and the like, or lead upon a church or house; that is, if any of these things were severed from the freehold, and at the same time, by one and the same continued act, carried off by the person who severed them,—because under such circumstances they could not, in strictness, be said to be the personal goods, as such, of any but the person who committed the trespass, since the very act of taking was what turned them into personal goods. (Vide 1 Hawk. P. C. 134. 140, 141. 6th Ed.—and 4 Bl. Comm. 229, &c.) Hence it should seem, that even an *entire asportation* of roots, or corn, if done at the same time, and as part of the same continued act of the digging up the one, and cutting down the other while growing, can hardly be said to constitute such an *asportation* of the property of another, as will entitle him to full costs on a general verdict in an action of trespass *quare clausum fregit*, without a certificate from the judge pursuant to the statute of *Car.* 2, where the damages are found under forty shillings, as in such cases the freehold certainly may come in question.—If such an asportation of property adherent to the freehold, shall be deemed sufficient in trespass *quare clausum fregit*, to carry full costs, on a general verdict, however small the damages may be, without a certificate, perhaps no good reason can be assigned why a *spoliation* of that species of property, should not, on a general verdict, be equally efficacious in constituting a title to full costs;—which militates against all the authorities on the point. Vide ante, page 66, &c.—And perhaps it might with equal force be contended that the digging up of turf, peat, &c. and *carrying the same away* amounts to such an *asportation*; but which, in *Clegg* v. *Molyneux*, was held insufficient, without a certificate. *Sed quære.*

Clegg and another v. Molyneux and another, B. R. T. 21 G. 3. Doug. 780.

In this case, a rule had been obtained to shew cause, why the master's *allocatur* of the costs taxed for the plaintiffs should not be vacated, and why he should not tax the defendants their costs on the *postea*. After argument at the bar, the case stood over during two terms for the judgment of the Court, it being understood, that there was, for some time, a difference of opinion among the judges.

Lord Mansfield now delivered the unanimous opinion of the Court, to the following effect;—This is an action of trespass *quare clausum fregit*. The first count states, that the defendants broke and entered the close of the plaintiffs, and the grass of the plaintiffs there then growing, with their feet, in walking, trod down, spoiled and consumed, and dug up, and got, divers large quantities of turf, peat, sods, heath, stones, soil, and earth, of the plaintiffs, in and upon the place in which, &c. *and* took and *carried away* the same, and converted and disposed of the same to their own use. There is another count, upon a similar trespass, in another close. The defendants have pleaded the general issue to *the whole declaration*, and two special pleas to the *second* count; and, on the trial, a verdict has been found for the plaintiffs, on the general issue, with one shilling damages, and for the defendants on the special pleas; and the judge has not certified. The question on this record, is, whether the plaintiffs are entitled to any more costs than damages under the statute of 22 and 23 *Car.* 2. c. 9.? There is a puzzle and perplexity in the cases on this part of the statute, and a jumble in the reports; and, as the question is a general one, we thought it proper to consult all the judges; and they are all of opinion,

that this case is within the statute, and that the plaintiffs ought to have no more costs than damages. You will observe, that what has been called an *asportavit* in this declaration, is a mode, a qualification, of the injury done to the land. The trespass is laid to have been committed on the land by digging, &c. and the *asportavit* as part of the same act; and, on the trial of the issue, the freehold certainly *might* have come in question. This is clearly distinguishable from an *asportavit* of personal property where the freehold cannot come in question, and which, therefore, is not within the act. Thus, after trees are cut down, and, thereby, severed from the freehold, if a trespasser comes and carries them away, that case is not within the statute, because the freehold cannot come in question. Here it might.

THE rule made absolute as to vacating the *allocatur* of the plaintiffs costs.

IN an action of trespass, the plaintiff declared for entering his house, continuing therein forty-eight hours, disturbing him in his possession, and eating and consuming twenty pounds weight of beef, specifying also several quantities of mutton, veal, lamb, beer and ale. Verdict for the plaintiff, and half a guinea damages. And, upon consideration, the Court awarded full costs to the plaintiff; for as to the goods, it was said to be in the nature of an action of trover, and that besides there was to all purposes *an asportation*, which always carried costs. Smith v. Clarke, B. R. P. 13 G. 2. 2 Str. 1130.

IF, in an action of trespass, *quare domum fregit et bona* Anon. B. R. T. 1675. 1 Freem. 394.

asportavit, the defendant be acquitted as to the breaking the house, and found guilty only of the taking away the goods, the plaintiff shall have full costs, of whatever amount the damages may be; for the acquittal of the defendant as to the trespass upon the freehold, reduces it to a question relative to mere personal property, which is not within the statute of 22 and 23 *Car.* 2.

AND a plaintiff shall have full costs without a certificate, if he obtain a general verdict with the smallest damages, on a count, which contains a trespass upon land, and also an injury to *personal* property. But to communicate this right, such injury or trespass upon the personal chattel or property must be laid in the declaration, *as a substantive and independent fact*, and not merely as a circumstance *in aggravation* of damages, or *as a consequence* of the trespass to the freehold or land. The reason, which renders a certificate unnecessary, on a general verdict for the plaintiff, where an injury to personal property is charged in a distinct and separate count, is equally applicable and conclusive in the present instance;—for the plaintiff having obtained a general verdict upon a count stating a trespass to the freehold or land, and a distinct trespass or injury to personal property,—*some* damages must necessarily be intended to have been given on account of the latter trespass, which is not a trespass within the meaning of the statute of *Car.* 2.

Hains v. Hughes, B. R. P. 7 W. 3. Comb. 324.

THUS, in an action of trespass for entering his close and cutting his cable, whereby he lost the use of his boat, a verdict being found for the plaintiff, damages two-pence, it was resolved that the plaintiff should have full costs.

So, in trespass for entering his close, and chasing and driving his sheep, and damages found under forty shillings, *no* certificate was held requisite to entitle the plaintiff to full costs, there being a damage done to a personal chattel. So, in trespass for breaking his close and chasing his bull, the plaintiff shall have full costs, without a certificate, if he recover *any* damages.

Arnold v. Thompson, P. 7 G. 2. Barnes, 119. S. C. Cas. Pr. C. P. 99. Thompson v. Berry, C. B. P. 9 G. 1. 1 Str. 551. S. C. cited Gilb. Eq. Rep. 197.

AGAIN, an action of trespass was brought for the entry of diseased cattle into the plaintiff's close, *per quod* the plaintiff's cattle were infected. Plea not guilty, and, on the trial, the jury found a verdict for the plaintiff with twenty shillings damages. No certificate having been granted by the judge, the question was, whether the plaintiff, under the circumstances of this case, had a right to full costs?

Anderson v. Buckton, B. R. T. 5 G. 1. 1 Str. 192.

THE *Chief Justice* (Sir JOHN PRATT), POWYS, and FORTESCUE, *Justices*, thought, that such right existed, because the consequential damage is a matter for which the plaintiff might have had a distinct satisfaction. And they likened it to the case of an action of battery, *per quod consortium* of the wife, or *servitium* of the servant, *amisit*, which for that reason are not within the statute. The true distinction is, where the matter alleged by way of aggravation will entitle the party to a distinct satisfaction. Asportation of trees may be a ground for trover, but yet may be laid as an aggravation in trespass, and the plaintiff shall have full costs. If a man enters and chases, and kills my cattle, that is a distinct wrong, but yet may be joined as matter of aggravation. Suppose, I have two closes at a great distance, and the same watercourse running through

both, I may allege the entry into one, *per quod* the water was prevented from coming to the other, and there shall be full costs.

EYRE, *Justice*,—was of a contrary opinion, because, he said, this recovery would not be pleadable in bar to a special action upon the case for the special injury;—*quod cæteri negaverunt*. And the plaintiff had full costs.

Granville v. Vincent, B. R. H. 2 G. 2. Fitzgib. 42. Semb. S. C. by the name of Grandey v. Wiltshire. 1 Barnard. K. B. 117. 127. 134.

AND in trespass *quare clausum fregit*, and trampled upon and spoiled a hay-rick of the plaintiff there then being, on a verdict for the plaintiff with damages under forty shillings, the Court said that, by the authorities, where a trespass was laid to be committed on a chattel severed from the freehold, the plaintiff shall, on a general verdict, have full costs. But, in this case, the judgment was afterwards arrested on an objection to the declaration.

Reeves v. Butler, In Scacc. H. 12 G 1. Gilb. Eq. Rep. 195. S. C. Bunb. 207.

BUT, in the following case, where the plaintiff declared, in the same count, for breaking his house and barn, and locking the doors of the said barn, and taking and detaining the goods and chattels of the plaintiff therein found, for a long space of time, and depriving him of the use of the said barn, house and goods, &c. on a verdict for the plaintiff, with only two-pence damages, it was holden that he should have no more costs than damages, because the judge had not certified that the freehold or title was chiefly in question.

LORD *Chief Baron* (1) GILBERT, in delivering the opi-

(1) When this case first came before the Court, *Eyre*, at that time, Chief Baron, thought that the plaintiff was entitled to full costs, but

nion of the Court, went very much at length into the statutes relative to costs, and the cases decided on the statute of 22 and 23 *Car.* 2; and he said that, although he doubted somewhat of it at first, he was then clearly of opinion with the rest of the Court, that the plaintiff should have no more costs than damages. In this case there is no count but where the freehold might possibly come in question. Here is no separate count for taking and detaining the goods and chattels, because it is connected with the breaking and locking up the barn, as to which the title might have been in question; and then the rest is laid merely in aggravation of damages. If a man will put his goods into my barn without my leave, he cannot enter and break in, in order to come at his own goods; and therefore, upon this count, the property of the goods might not be in question, but merely the barn that was thus broken.

And should that part of the declaration, which charges an injury to, or *asportavit* of personal property,—whether as a substantive fact in the same count with a trespass to the freehold or land, or in a distinct and separate count,—be found for the defendant, the plaintiff cannot have more costs than damages, if the latter are found under forty shillings, and the judge have omitted to certify that the freehold or title was in question; for by negativing that part of the complaint relative to the personal property, the verdict converts the case

2 Vent. 180. 195. Cas. Pr. C. P. 118. Bunb. 208.

the other Barons, *Price*, *Page*, and *Gilbert*, being doubtful, the question was then adjourned; before the matter was reconsidered by the Court, Lord Chief Baron *Eyre* was appointed Lord Chief Justice of the Court of Common Pleas, and Mr. Baron *Gilbert* created Lord Chief Baron of the Exchequer in his room, who afterwards delivered the unanimous resolution of himself and the rest of the Court, (*Price*, *Page*, and *Hale*, Barons) against the plaintiff's right to full costs.

into a mere action of trespass *quare clausum fregit*, and thereby brings it immediately and expressly within the words of the statute of 22 and 23 *Car.* 2. c. 9. (1)

1 Freem. 215. 2 Mod. 142. Gilb. H. C. P. 263.

BUT wherever, in an action of trespass *quare clausum fregit*, it is apparent, on the face of the pleadings, or from the nature of the case, that the freehold or title of the land is in question, a certificate upon the 22 or 23 *Car.* 2, is by no means essential to constitute a title to full costs. For here it would be superfluous and nugatory to certify, it being notorious upon the record, that no other question could be in litigation or dispute, but a question concerning the title; to ascertain which particular, is the sole object of the certificate prescribed by this statute.

Kempster v. Deacon, C. B. P. 8 W. 3. 1 Ld. Raym. 76. S. C. Salk. 665.

THUS, where the plaintiff recovered only thirteen shillings damages in an action of trespass *quare clausum fregit*, wherein it appeared upon the record, that a view had been taken by consent of the parties, though the judge had not certified, it was holden that the plaintiff should have full costs. And by the Court, a view cannot be granted unless the title comes in question; and therefore the granting it, is equivalent to a

(1) In actions of trespass *quare clausum fregit*, where an asportation or injury to personal property is likewise charged, some attention should be given, on the part of the defendant, to the declaration, and the evidence at the trial; that, if that part of the complaint relating to the personal property be not proved, the verdict may be properly entered; for if the defendant be found not guilty as to that part of the declaration, and the damages found under forty shillings, there must be a certificate to entitle the plaintiff to full costs. Though it is said, if the verdict was taken generally where there was no evidence given of an *asportavit*, and damages under forty shillings, the Court will, on motion, amend the verdict by the judges notes. Gilb. Eq. Rep. 199. 1 Bac. Abr. 514. *marg.*

certificate that the title came in question; and by all the prothonotaries it is always the practice to allow full costs, where a view is granted.

In another case, which was trespass *quare clausum fregit*, and spoiled his grass, the defendant justified the trespass under a right of way there; replication, *extra viam*, and issue thereon. A verdict being found for the plaintiff, on the trial, with damages not amounting to forty shillings, the sole question was, whether he should have full costs, or no more costs than damages? And it was said no title came in question upon the trial, for the way was admitted, and the issue was only whether the defendant was guilty *extra viam*. But by the Court,—the plaintiff shall have full costs; for first, there was a title to the way in question upon record, and so the case is out of the intent of the statute; and, secondly, upon this issue *extra viam*, a title to the way is in question, *viz.* of what extent the way is?—whether ten or twenty feet in breadth, &c. all which came in question upon the trial. Otherwise, perhaps, if the *extent and place* where the way lies had been *agreed* in the pleadings. In the principal case, the plaintiff had full costs.

Asser v. Finch, B. R. M. 30 Car. 2. 2 Lev. 234. S. C. by the name of Absor v. French, 2 Show. 28. but not S. P. S.C. cited Gilb. Eq. Rep. 198, 9.

The doctrine laid down in *Asser* v. *Finch*, has been confirmed by two subsequent resolutions, where the question appears to have occurred upon precisely the same pleadings with those in the first mentioned case. But it is otherwise, if the way, under a right to which the defendant justifies, be *defined by metes and bounds* in the plea, and the plaintiff reply *extra viam*; for here no doubt can arise concerning the extent and locality of the way, since these circumstances

Higgins v. Jennings, B.R.M. 13 G. 1. 2 Ld. Raym. 1444. S.C. 2 Str. 726. S. P. Beale v. Moor, B. R. T. 15 G. 2. 2 Str. 1168.

are admitted and agreed by the pleadings; and, therefore, in such case a certificate from the judge, that the freehold or title was in question, is necessary to entitle the plaintiff to full costs, in case the jury find damages under forty shillings.

Cockerill v. Allanson, B. R. T. 22 G. 3.

THUS, in an action of trespass, for breaking and entering the close of the plaintiff, called the *Croft*, and for committing therein divers trespasses on foot and with cattle, carts, waggons, &c. and also for other trespasses in other closes, the defendant pleaded several pleas; first, not guilty generally, on which issue was joined. 2dly, A justification of the trespasses in the close called the *Croft*, under a right of way, which had been set out, by an award of commissioners, authorized for that purpose, by an inclosure act of parliament. This plea, after setting forth in part the act of parliament for inclosing certain open fields, of which the *locus in quo* was parcel, and the powers, therein contained, enabling the commissioners, by their award, to lay out proper ways, &c. and the making of such award by the commissioners, proceeded thus,—" and did thereby *order*, &c. that there " should be at all times thereafter a road or way for cattle, " carts and carriages *of the breadth of twenty feet*, as the " same was then *staked, ditched, or bounded out*, lying " in the said place called the *Croft*, leading from a certain " public highway called the *Malton* road, in the said award " before mentioned, southward, into through and over the " said place in which, &c. by the description of the east side " of lands therein awarded to the said *J. Cockerill* (the " plaintiff) to and from a certain other public highway " in the said award mentioned, called *West-Lane*, where-

"fore," &c. Replication new assigns other trespasses done and committed "by the defendant otherwise and on other "occasions, and for other purposes than *in and for the "using of the said way and out of that way.*" Rejoinder not guilty to the new assignment. There was another plea to other trespasses, justifying them by escape of cattle through the defect of fences reparable by plaintiff; to this last plea, there was a replication traversing the prescription to repair, and rejoinder, taking issue on the traverse. On the trial at *York* assizes, 1782, there was a verdict found for the defendant on the issue taken upon the traverse of the prescription to repair, and, for the plaintiff, on the two pleas of not guilty; damages thirty shillings.

THE master having taxed full costs for the plaintiff, a rule was obtained to shew cause why he should not review his taxation.

ON shewing cause against this rule, the counsel for the plaintiff cited the cases of *Asser* v. *Finch*, *Higgins* v. *Jennings*, and *Beale* v. *Moor*, and urged the practice of allowing full costs under similar circumstances. For the defendant it was said, that this case was materially distinguishable from that in 2 *Lev.* there the way was not accurately defined in the plea, but here it is exactly described and by the new assignment, the extent and direction thereof are both admitted; and then the case is nothing more than the plea of the general issue to an action of trespass *quare clausum fregit*, consequently a certificate is necessary to entitle the plaintiff to full costs.

Supra, 85.

Lord Mansfield.—This question arises on the construction of a statute, which was made for the prevention of frivolous suits for casual and accidental trespasses, occasioning no material detriment or injury to the owner of the soil. A new assignment is like a new action; and the present case is exactly the same as a new declaration in an action of trespass *quare clausum fregit*, and not guilty pleaded to it. The defendant possesses a right of way, and, the declaration being general, it is incumbent upon him to plead such right; he has done so with absolute certainty, for he has pleaded it as laid out by stakes by commissioners; the plaintiff in his replication admits the way as delineated in the plea, but says that his action was commenced for trespasses, committed *out of that way*, to the charge of these latter trespasses the defendant pleads not guilty, and thereby reduces it to a mere general action of trespass without a justification; and as the damages are found under forty shillings, and the judge hath not certified, the plaintiff can have no more costs than damages. And this is agreeable to what is contained in the latter part of the report of the case in *Levinz*, where it is said that it might have been otherwise, if the extent and place where the way lies had been agreed in the pleadings.

By the Court. Rule absolute. (1)

(1) In the Law of *Nisi Prius*, last Ed. 330. there is a short note of the case of *Cockerill* v. *Allanson* in the following words—"Adjudged "that where defendant justified for "a right of way, and the plaintiff "replied *extra viam*, and the defen- "dant pleaded not guilty, the plain- "tiff should have no more costs "than damages, unless the judge "certified; for the title does not "necessarily come in question. It "may or it may not; and if it does, "the judge ought to certify:"—whence it should seem to be the opinion of Mr. Justice *Buller* that

Ibbotson v. Brown, P. 11 G. 2. Barnes, 124. 129. S.P. Lloyd v. Day T. 32 and 33 G. 2. Barnes, 149.

In an action of trespass *quare clausum fregit*, the defendant having pleaded a justification; the plaintiff made a new assignment, to which there was a plea of not guilty. The plaintiff obtained a verdict with damages under forty shillings, and the judge, before whom the cause was tried, not having certified that the title was in question, a doubt arose whether the plaintiff should have full costs or not. And it was holden that there should be no more costs than damages. A new assignment is equivalent to a new declaration; and as the defendant hath here pleaded to it not guilty, there was in reality no special pleading in the case.

2 Vent. 180. 195.

If the defendant plead two pleas, not guilty and a justification, in an action of trespass *quare clausum fregit*, and a verdict be found for the plaintiff on the former, with damages under forty shillings, and a verdict for the defendant on the latter, the plaintiff cannot have full costs, in case the judge have not certified upon the statute of *Car.* 2. because the issue joined on the special plea having been found for the defendant, the case is exactly the same as if only the general issue had been pleaded.

Philpot v. Jones, H. 1 G. 1. cited 2 Barnard. K. B. 277. and 6 Vin. Abr. 359.

In trespass for breaking the plaintiff's house, the defendant justified as bailiff under process; the plaintiff replied that the doors were shut, upon which issue was joined. Verdict for the plaintiff, damages two-pence, and no certificate

e principle which governed the solution in *Cockerill* v. *Allanson*, tends to deprive a plaintiff of full osts, without a certificate in cases where a right of way is *generally* pleaded, as in 2 Lev. 234, and a replication of *extra viam* and not guilty thereto. *Sed quære.*

from the judge who tried the cause; and it was resolved that the plaintiff should have no more costs than damages.

Of Costs in Actions of Trespasses committed by inferior Tradesmen, &c. in hunting, &c.

Inferior tradesmen, &c. liable to costs in actions of trespass for hunting, &c. upon another man's ground.

THE statute 4 and 5 *W.* and *M.* c. 23. s. 10. (after reciting that great mischiefs do ensue by inferior tradesmen, apprentices and other dissolute persons, neglecting their trades and employments, who follow hunting, fishing, and other game, to the ruin of themselves, and damage of their neighbours) enacts—"That if any such person as aforesaid shall "presume to hunt, hawk, fish, or fowl (unless in company "with the master of such apprentice, duly qualified by law) "such person or persons shall be subject to the penalties of "this act, and shall or may be sued and prosecuted for their "wilful trespass in such their coming on any person's land, "and if found guilty thereof, the plaintiff shall not only re-"cover his damages thereby sustained, but his full costs of "suit; any former law to the contrary notwithstanding."

THIS statute, in all actions of trespass *quare clausum fregit*, prosecuted against inferior tradesmen and the persons therein described, for trespasses committed in hunting, &c. entitles plaintiffs, if they recover any damages, to full costs of suit, and in *such* actions dispenses with the certificate prescribed by the 22 and 23 *Car.* 2, where the damages are found under forty shillings, and, consequently, so far, operates as a partial repeal of the latter statute.

It hath been adjudged, in one case, that the statute of 4 and 5 *W.* and *M.* extends to all inferior tradesmen, however they may be qualified in point of estate.

Trespass *quare clausum fregit et herbam cum duabus vaccis conculcavit et consumpsit et in clauso venatus fuit, &c. existente inferiori artifice*, viz. *pannario, et alia enormia, &c.* and concludes *contra formam statuti.* Plea not guilty; and upon the trial, the plaintiff recovered a verdict, and twopence damages. And, in order to prevent full costs, it was moved in arrest of judgment, 1. That it is not said, that the defendant is not qualified by estate to hunt, without incurring the penalty of the act; for if he be, he might hunt by law. But to this it was resolved by the Court, that hunting is a trespass *in alieno solo* at common law, and actionable. (*a*) Then the statute 4 and 5 *W.* and *M.* c. 23, as to this point of inferior tradesmen, only repeals that of 22 and 23 *Car.* 2. c. 9. which enacts, that there shall be no more costs than damages, when the jury give damages under forty shillings. But no act enables the party to hunt in another's ground; and therefore it is not material, how the person is qualified, in the case of an inferior tradesman as to his estate. Then it was moved that the plaintiff having concluded *contra formam statuti*, which goes to the whole, the declaration is ill; for part of the trespass is an offence at the common law, and not against any statute. But by Holt, *Chief Justice*,—where an act of parliament increases a penalty, or deprives the party of the benefit of the common law, there ought to be the conclusion *contra formam statuti*; but it is otherwise, if there be no act of parliament, and the plaintiff conclude *contra for-*

Bennet v. Talbois, B. R. H. 8 and 9 W. 3. 1 Ld. Raym. 149. S.C. rep. in Carth. 382. 5 Mod. 307. Holt, 661. Comb. 420. 12 Mod. 121. Salk. 212. Com. 26, but only Ld. Raymond notices the point relating to the qualification of inferior tradesmen as to estate; the other books contain nothing more but the objection to the conclusion of the declaration.

(*a*) But it hath been holden that a man may justify trespass in *following* a fox with hounds over the grounds of another, if he do no more than is necessary for killing the fox. Gundry v. Feltham, T. 26 G. 3. 1 Term Rep. 334.

mam statuti, there such conclusion shall be rejected, as surplusage; so if the party sues for both an offence at common law and an offence against a statute and concludes *contra formam statuti*; though this may refer grammatically to the whole count, yet the Court will refer it only to the offence prohibited by the statute, and will deem it surplusage as to the common law offence. 1 *Vent.* 103. *Aleyn*, 43. In this case the 4 and 5 *W.* and *M.* doth not create a new penalty, but is a restitution of the (*a*) common law; therefore as the party hath no occasion to declare with *contra formam statuti*, it would be better to omit that conclusion, in such cases. And if the plaintiff declare that the defendant was an inferior tradesman he shall have full costs; then the conclusion *contra formam statuti*, being here unnecessary, shall be rejected as surplusage. Judgment for the plaintiff.

(*a*) This expression must be intended to refer to the law as it stood between the making of the statute of *Gloucester* and that of 22 and 23 *Car.* 2. when by the former statute in all actions *quare clausum fregit*, costs were recoverable by the plaintiff, if he obtained a verdict for any the smallest damages.

FROM the report of the case of *Bennet* v. *Talbois* by Lord *Chief-Baron* COMYNS, it appears, that another objection besides those already mentioned was taken in arrest of judgment; namely, that the defendant, being *a clothier*, could not be comprehended within the words "*inferior tradesmen*," used in the statute, because a clothier was one of the principal tradesmen of the kingdom. *Sed non allocatur*; (says the book) for the statute seems to prohibit *all* trades. But none of the other reports of this case take notice of this point.

IT is somewhat remarkable, after the discussion in the case of *Bennet* v. *Talbois*, wherein the Court resolved that the conclusion *contra formam statuti*, in an action on the 4 and

W. and *M.* should be rejected as surplusage, because totally unnecessary, that, a very short time afterwards, the *omission* of that conclusion, in a similar action, should be made the subject of a motion in arrest of judgment.

Shadow v. Painter, B. R. T. 9 W. 3. Carth. 424.

For in trespass for breaking and entering the plaintiff's warren and close and destroying the grass, &c. and hunting therein with rabbit-dogs, without the licence and against the will of the plaintiff, the defendant being an inferior tradesman, *viz.* a blacksmith, and not qualified to keep rabbit-dogs, and other wrongs, &c. the plaintiff having obtained a verdict, with seven shillings damages, it was moved that he should not have full costs, because the offence was not charged *contra formam statuti*; and because it was not laid that the defendant hunted and *killed* game, but only that he *hunted* generally. However, without argument, the plaintiff had judgment.

Notwithstanding the above resolutions in *Bennet* v. *Talbois*, according to the reports of that case in *Ld. Raym.* 149, and *Comyns*, 28, it is by no means an established point, at this day, what species of tradesmen are comprehended within the meaning of the words "*inferior tradesmen.*" In the following case this matter underwent a very elaborate discussion in the Court of Common Pleas, in which there was a difference of opinion among the judges; Bathurst and Clive, *Justices*, there held that the criterion of the inferiority of tradesmen, within the intent and spirit of this act of parliament was their being *qualified* or *unqualified* in point of estate, and that it was a question of law; and although

Lord *Chief Justice* WILLES, and NOEL, *Justice*, did not coincide in this mode of construction—that *every unqualified* tradesman was included *within* the words of the 4 and 5 *W.* and *M.* and thought that it should be left to the jury, yet their arguments seem to furnish a pretty fair inference, that they conceived *every qualified* tradesman to be *out* of that statute.

Buxton v. Mingay, C. B. T. 30 & 31 G. 2. 2 Wils. 70.

THIS was an action of trespass *quare clausum fregit*, wherein the plaintiff declared that the defendant, being an inferior tradesman, to wit, an apothecary, broke and entered his close and hunted therein. The defendant pleaded the general issue, not guilty; and the cause was tried at *Thetford*, *March* 13, 1752, before Mr. *Justice* DENISON, when a verdict was found for the plaintiff, damages one shilling and costs forty shillings, subject to the opinion of the Court upon a case reserved; which stated—that the defendant at the time of the trespass was a surgeon and apothecary, and not qualified to hunt or kill game within the intent of the statutes; and, when the trespass was committed, was hunting with divers others not qualified, in company with a person who was duly qualified to kill game. The question for the consideration of the Court was, whether the defendant should be deemed an inferior tradesman within the meaning of the 4 and 5 *W.* and *M.* c. 23.?

THE question was argued several times at the bar; for the plaintiff it was insisted that there was no such distinction as superiority or inferiority between trades, or tradesmen, either in legal or common apprehension; and that, therefore, the

legislature could never mean to consider one trade as superior to another, or to make any distinction in trades, but that by the words inferior tradesmen, they meant every person in trade not qualified by law; and that this was a reasonable construction *et secundum subjectam materiam*, that statute being made for the preservation of the game. For the defendant it was argued, that no qualification is necessary for hunting, and therefore it cannot be the criterion to determine who is, or is not an inferior tradesman within this statute. That every case of this kind ought to be left to a jury, who were to determine, under the particular circumstances of the case, to whom that description extended; otherwise, it was said, the lord mayor or richest tradesman in *London*, could not lawfully hunt without a qualification in lands, which could never be the meaning of the legislature.

THE Court being divided in opinion, the judges delivered their opinions *seriatim*.

NOEL, *Justice*,—I think it would be hard for me to say, that every tradesman in this kingdom (however rich in money), who hath not a qualification in lands, shall pay full costs in a case like this; nor can I prevail upon myself to say, that the defendant, because he is merely stated to be an apothecary, is, therefore, an inferior tradesman, or a dissolute person.

IT was argued for the plaintiff, that amongst tradesmen, as *such*, there can be no line drawn with respect to who are superior, and who are inferior, but that they are all upon an

equal footing as tradesmen, and that, therefore, the legislature by the words *inferior tradesmen* meant such as were not qualified; but I think, if this construction were to prevail, it would bring every gentleman (though of the best families in *England*) as well as rich tradesmen, who have not a qualification, within the meaning of this clause.

It was insisted for the defendant at the bar, that a qualification was unnecessary to authorize a person to hunt; I shall say nothing to that point; but however that may be, I think a person going out with a gentleman qualified to kill game, cannot be convicted for killing game as an unqualified person.

It is said for the plaintiff, that if the qualification be not the true distinction, no line can be drawn between *superior* and *inferior*; but I answer, there is a known distinction universally agreed to be betwixt tradesmen, with respect to superior and inferior, as master, journeyman, and apprentice; and this is a natural subordination, which answers the act of parliament in every respect, for journeymen and apprentices are plainly inferior, and within the mischief intended to be remedied; I do agree that the statute says, "*unless in company with a master qualified*," and that every apprentice being out a hunting, not in company with a master qualified, is within the statute.

I think the jury, at the trial, ought to determine, under the particular circumstances of every case of this kind, whether the defendant be, or be not an inferior tradesman, or dissolute

person; and it is too much for me to say, that this defendant, who is an apothecary and surgeon, is an inferior tradesman, or a dissolute person.

Upon the whole, I am of opinion, that the defendant cannot be said to be an inferior tradesman, or a dissolute person, and that the plaintiff ought to have no more costs than damages.

Bathurst, *Justice*.—I think this is a question of law and not of fact, and that the judges, and not the jury, are to determine who are inferior tradesmen or dissolute persons within this law. In order to arrive at the true construction of this statute, we must take the intent of the makers into consideration, which was plainly to secure the game from being destroyed by persons neglecting their lawful employments, as appears by the preamble. There may be an inferior and superior between master, and journeyman, and apprentice, but I can never be of opinion that the legislature intended to permit every master of every little mechanic trade to neglect his trade and go a hunting; the clause, under consideration (it must be admitted) is penned a little obscurely, but I am of opinion that every tradesman is inferior, who is not qualified, and that is the only line we can possibly draw between inferior and superior. And I am inclined to think the parliament purposely penned the act in this obscure manner not to disoblige their constituents, many of whom were tradesmen. In *Bennet* v. *Talbois, Comyns*, 26. it was objected, that a clothier was not an inferior tradesman; *sed*

non allocatur (says the book), for the statute seems to prohibit all trades. I am of opinion, therefore, upon the whole, that all qualified tradesmen are not inferior tradesmen, and that all unqualified tradesmen are inferior.

CLIVE, *Justice*,—said he entirely agreed with his brother BATHURST, and delivered his opinion to the same effect.

WILLES, *Chief Justice*.—The single question here is, who is the tradesman that shall pay full costs in a twelve penny trespass, in hunting in company with a gentleman qualified.

I DO not think it necessary to draw any line at all in this case, but it ought to be considered upon its own circumstances; and I am clearly of opinion the legislature could never intend that a surgeon is an inferior tradesman, within this clause; I think the case consists both of matter of law and matter of fact, and if I had been to try this cause, I should have told the jury my opinion, upon hearing the evidence and circumstances of the defendant, and have asked them, whether upon their oaths they could say that this defendant, was an inferior tradesman, a dissolute person, or neglected his trade? and in this manner I should have spoke to them, and then left them to say, what was their verdict upon the whole evidence and circumstances of the person and case of the defendant. For my own part, I cannot upon my oath say, that this defendant, merely as an apothecary and surgeon is an inferior tradesman, or a dissolute person, and agree entirely with my brother NOEL, that the plaintiff

should have no more costs than damages. Therefore as the Court is equally divided there can be no rule, but let the *postea* remain in Court.

If, in an action of trespass for hunting, &c. laid upon the 4 and 5 *W.* and *M.* c. 23, the plaintiff do not prove the circumstances under the statute, but only the trespass, he shall, nevertheless, recover as in a common action of trespass *quare clausum fregit*, the only consequence will be, that he can have no more costs than damages, if these are found under forty shillings, except the judge should certify upon the statute 22 and 23 *Car.* 2. that the freehold or title was in question.

Accordingly, where the plaintiff declared in trespass, for that the defendant, "being a dissolute person neglecting "his employments, and following hunting and other game, "and by no means qualified by law so to do," broke and entered the plaintiff's closes, and with dogs, guns, and other engines for destruction of the game, hunted upon the said closes, trod down the grass and corn, and broke the fences, &c. "against the form of the statute." Plea not guilty, and verdict, on the trial, for the plaintiff for one shilling damages, subject to the opinion of the Court upon this case. Pallant v. Roll, C. B. P. 13 G. 3. 2 Blackst. 900.

The defendant was unqualified in his own right to kill game, but was menial servant and huntsman to a gentleman who was qualified, and when the trespass was committed was hunting with his master's hounds and by his orders, his master not being present, and was beating over the plaintiff's

grounds. The plaintiff requested him to go off his land, which he refused, and at length found a hare, which he hunted over several closes mentioned in the declaration. If the Court should be of opinion, that the defendant is not a person within the 4 and 5 *W.* and *M.* can the plaintiff recover against him in this action, or ought he to have brought a common action of trespass *quare clausum fregit?*

De Grey, *Chief Justice*,—We have no doubt but that the defendant is not a dissolute person, &c. within the statute. The only real question is, whether as this action is framed, the plaintiff can recover any thing? He certainly cannot have his full costs; if he cannot recover any thing, but is non-suit, he must pay costs: if he can recover as upon a common action of trespass, he saves his costs. Now certainly any man might have always brought an action of trespass for hunting upon his grounds. For this injury, among others, the statute of *Gloucester* gave costs as well as damages. The statute of 22 and 23 *Car.* 2, to prevent vexation, lowered the costs, and if less than forty shillings recovered, gave no more costs than damages. The statute of 4 and 5 *W.* and *M.* restored full costs again, even in case of small damages recovered against dissolute persons, inferior tradesmen, &c. This statute gives no new cause of action; the old right of action always existed, and does still exist. The plaintiff complains of a trespass, and sues for the common law remedy. He also states collateral circumstances, which under the statute would entitle him to full costs upon a verdict for small damages. If he prove those circumstances, he hath his full costs; if they are not proved, they are mere words of sur-

phrase, and the defendant stands exactly in the same situation as if the statute 4 and 5 *W.* and *M.* had never been made. Many cases in the books have been cited, but none applicable to the present question. For the only point upon which the Court give their opinion, is, that the circumstances stated and not proved do not affect the cause of action itself, but merely a collateral consequence, that of costs.

GOULD, BLACKSTONE, and NARES, *Justices*, of the same opinion.

Postea to the plaintiff, and verdict entered, by consent, that the jury find the defendant not a dissolute person, &c. but guilty of the trespass, damages one shilling, costs one shilling.

IF the verdict, in an action of trespass upon the statute 4 and 5 *W.* and *M.* find the defendant to be an inferior tradesman (as, for instance, a clothier and ale-house-keeper), the circumstance of his having committed the trespass, for which the action was brought, in hunting in company with a person qualified to kill game, will not exempt him from the payment of full costs; for the statute was made to prevent such people from mis-spending their time; and the defendant's trade is equally neglected by his hunting in the company of a qualified or an unqualified person. *Per Holt*; every tradesman *not* qualified, is an *inferior* tradesman. Wickham v. Walker, M. 11 G. 1. Barnes, 125.

THE declaration in an action of trespass contained two Dickenson v. Pearson,

coram *Wilson*, J. at Carlisle assizes, 1787.

counts; first, that the defendant being an inferior tradesman, to wit, "*a bricklayer*," broke and entered the plaintiff's closes and hunted therein; and another count stated the trespasses in the usual manner, without alleging the defendant to be an inferior tradesman. The evidence produced at the trial, proved that the defendant was a *waller* and *not* a *bricklayer*, as charged in the first count of the declaration. It was held by WILSON, *Justice*,—that the plaintiff's evidence was insufficient to entitle him to full costs under the 4 and 5 *W.* and *M.* for that, to have the benefit of that statute, it was not alone sufficient that the defendant was an inferior tradesman, but it was also incumbent on the plaintiff to prove him that particular species of tradesman named in the declaration, though alleged under a *videlicet*; and a verdict was found for the defendant on the first count, and for the plaintiff on the second, with a farthing damages.

Of Costs in Actions for wilful and malicious Trespasses.

If the defendant be found guilty of a wilful and malicious trespass the plaintiff to have full costs, as well as damages.

FOR the preventing of wilful and malicious trespasses, the statute 8 and 9 *W.* 3. c. 11. s. 4. enacts, "that in all actions "of trespass to be commenced or prosecuted in any of his "majesty's courts of record at *Westminster*, wherein at the "trial of the cause it shall appear, and be certified by the "judge, under his hand, upon the back of the record, that "the trespass upon which any defendant shall be found guilty, "was wilful and malicious, the plaintiff shall recover not "only his damages, but his full costs of suit; any former law "to the contrary notwithstanding."

In delivering his opinion in the case of *Milburne* v. *Read*, 3 Wils. 325. Lord *Chief Justice* Willes took occasion to remark, that the statute of 8 and 9 *W.* 3. c. 11. was intended by the legislature to relieve only in the very same sort of actions, as did that of the 22 and 23 *Car.* 2, but gave costs upon a different principle, not to prevent frivolous and vexatious suits, as was the object of the latter statute, but to prevent wilful and malicious trespasses, and *that*, not malicious trespasses upon lands, but of all sorts; and hence says his lordship, it is evident that the legislature did not understand the statute of *Car.* 2. in the same manner as the courts of law did, but understood it to extend to *all* personal actions; for if they had been of opinion that the statute of *Car.* 2. took away costs from no trespasses besides *clausum fregit*, and *assault and battery*, they could have had no reason for extending the 8 and 9 *W.* 3. generally, *to all trespasses*; but in order to reconcile the two acts of parliament there has been a construction put upon the latter, which I will not adhere to; which is, that it only extends to *clausum fregit*, and that in fact there hath been no certificate upon this statute, but in trespass *quare clausum fregit*, though the statute is *not restrictive*, but speaks *generally* of *all trespasses*, and was made to prevent wilful and malicious trespasses *generally*. But there are other actions of trespass besides that of *clausum fregit*, wherein I will grant certificates upon this statute, though none were ever granted, in such cases, before.

Indeed, pursued his lordship, in actions for taking goods and chattels merely, I will not certify, upon the 8 and 9 *W.* 3. for the absurdity of such a step; because, as we have deter-

mined that the statute of *Car.* 2, extends only to *clausum fregit*, it would be ridiculous to certify in personal trespasses, for in these the plaintiff, though his damages amount not to forty shillings, will have full costs by the statute of *Gloucester*, unless the judge should certify upon the 43 *Eliz.* that the damages to be recovered are under forty shillings; but the case in which I will certify upon the 8 and 9 *W.* 3. (though not a trespass *quare clausum fregit*) is an action of trespass for a *voluntary and malicious assault*, unattended with a battery. Suppose a man draws a sword and swears he will stab me, and makes a pass at me, but misses me, in this case I cannot certify upon the statute of *Car.* 2, because there was *no battery*, but I will certify upon that of 8 and 9 *W.* 3. that such *trespass* or *assault* was *wilful and malicious*, and let the defendant deliver himself from costs how he can.

HOWEVER, no instance of a certificate upon the statute of 8 and 9 *W.* 3. occurs in the books, except in actions of trespass *quare clausum fregit*.

3 Bl. Comm. 214. Vide 1 Term Rep. 636. acc.

AND every trespass is *wilful*, within the meaning of this act of parliament, where the defendant has notice, and is especially forewarned not to come on the land; as every trespass is *malicious*, where the intent of the defendant plainly appears to be to harass and distress the plaintiff.

6 Vin. Abr. Tit. Costs, 332. pl. 37.

AND it was held by Mr. *Justice* EYRE, at *Essex* Lent assizes, 1719, that where a trespass was *wilful*, a judge would certify, though *no malice proved*; which was said to be the practice.

A CERTIFICATE, under this statute, that the trespass was wilful and malicious, must be made by the judge, in Court, at the trial; and such certificate, made *out of Court*, has been determined to be void. Ford v. Parr, C.B.P. 28 G. 2. 2 Wils. 21.

SECT. IV.

Of Costs, where a Defendant in any Action, or a Plaintiff in Replevin, hath leave to plead several Matters.

THE statute 4 *Ann.* c. 16. s. 4. enacts,—"That it shall and "may be lawful for any defendant or tenant in any action or "suit, or for any plaintiff in replevin, in any court of record, "with leave of the same court, to plead as many several mat-"ters thereto, as he shall think necessary for his defence. Defendant, &c. may plead several matters.

4 *Ann.* c. 16. s. 5. "Provided nevertheless, that if any "such matter shall, upon a demurrer joined, be judged in-"sufficient, costs shall be given at the discretion of the "Court; or if a verdict shall be found upon any issue in the "said cause, for the plaintiff or demandant, costs shall be "also given in like manner, unless the judge, who tried the "said issue, shall certify, that the said defendant, or tenant, "or plaintiff in replevin, had a probable cause to plead such "matter which upon the said issue shall be found against "him." Proviso relative to costs.

4 *Ann.* c. 16. s. 7. "Provided always, and be it enacted, "that nothing in this act before contained shall extend to any Not to extend to writs of appeal of felony, or murder, &c.

" writ, declaration, or suit of appeal of felony or murder, or " to any indictment or presentment of treason, felony, or " murder, or other matter, or to any process upon any of " them, or to any writ, bill, action, or information upon any " penal statute."

3 Term Rep. 391.

THE costs, intended by this statute, are nothing more than the costs of *those pleadings*, which have either been adjudged insufficient upon demurrer, or found, by the verdict, for the plaintiff; consequently, the right to the general costs of the cause remains unaffected by this statute.

THE words in the fifth section of this act of parliament, —*viz.* " costs shall be given at the *discretion* of the Court,"— have given rise to some doubt and disquisition,—whether that discretion was meant by the legislature to extend to *all* the costs, (that is, to enable the Court, if it should be deemed proper, to refuse to allow *any costs at all*,) or to be restrained to the *quantum* of those costs.—The latter opinion is supported by the greater weight of authorities, and an attentive consideration of the object and language of this part of the 4 *Ann.* c. 16. will make it abundantly evident that this construction is most consonant to the intention of the legislature. It was observed by Mr. *Justice* BULLER, in the case of *Duberley* v. *Page*, that the meaning of the legislature, in passing this act of parliament, was, that though they would grant an indulgence to the defendant, by permitting him to plead several matters, (which could not be done prior to this statute) yet it should not be prejudicial to the plaintiff; if, therefore, a defendant, exercising the privilege conferred

upon him by this statute, plead several matters, which are either adjudged, or found against him on demurrer, or trial, it is but just and reasonable, that he should sustain the expences incurred by such his own false, or improper pleading. However, in the case of *Hovard* v. *Chesbire*, determined upon the opinion of all the judges, a different meaning appears to have been annexed to the words of this clause. The following are the determinations upon this subject.

Jones v. Davies and wife, P. 22 G. 2. Barnes, 140.

In an action of assault and battery, the defendants, by leave of the Court, pleaded several matters, namely an accord with satisfaction by the husband; that what the wife did was in aid of her husband; not guilty; and *son assault demesne*. On the trial, a verdict was found for the defendant on the two first mentioned pleas, and on the residue for the plaintiff, without any damages; and the judge did not certify that the defendants had probable cause to plead the two pleas found for the plaintiff. On motion, the Court directed the costs of the two latter pleas to be allowed the plaintiff, and that the same should be deducted out of the costs allowed the defendants, saying, that they had no discretionary power, but were bound by the 4 *Ann.* as the judge had not certified.

And if the plaintiff obtain judgment on a demurrer to a special plea before the trial on the general issue, he shall have costs of the pleas adjudged insufficient on the demurrer, notwithstanding he may be afterwards *nonsuited* on the trial of the general issue.

Greenhow v. Isley and others, P. 21 G. 2. Barnes, 136.

THUS, in an action on the case by a commoner against defendants for digging turfs, &c. upon the waste, where the right of common was claimed, whereby the plaintiff could not enjoy, &c. the defendants, by leave of the Court, pleaded the general issue, and two special pleas, one of the latter of which was adapted to the first, and the other to the second count of the declaration. There were new assignments to the two special pleas, and a special plea to the new assignments, to which the plaintiff demurred; on the demurrer the plaintiff had judgment, but on the trial of the issue, joined upon the not guilty, was nonsuited. Under these circumstances, the prothonotary had a doubt with respect to the mode of taxing the costs.

AFTER hearing arguments on both sides, and a consultation with all the judges (among whom was some diversity of opinion), the Court directed the prothonotary to tax the plaintiff's costs of the demurrer, according to the statute of 4 *Ann.* and that so much as should be allowed upon such taxation, should be deducted out of the sum allowed the defendants for their costs, upon the nonsuit.

So, if one of several pleas, pleaded by the defendant, be adjudged bad on a demurrer to the plaintiff's replication thereto, the plaintiff is entitled to have the costs of those pleadings, deducted from the costs taxed for the defendant on the *postea*, if the defendant, afterwards, obtain a verdict upon the trial of the issues joined on the other pleas, even though it should appear on the whole of the record, that the plaintiff had no cause of action.

As where, in an action of trespass for breaking and entering a close, lately part of a waste in the manor, the defendants pleaded not guilty and several justifications; one, under a right of common, to which the plaintiff replied a right of approving in the lord, leaving a sufficiency of common; another, under a right of digging sand or gravel upon the waste, which was traversed by the replication. There was another justification under a custom in the manor relating to the mode of inclosing the waste; replication that the lord had a right to inclose the said parcel under the statute of *Merton*, and did approve the same, there being left common sufficient. To this the defendants demurred severally, and joinder by the plaintiff. Judgment was given for the plaintiff on the demurrers, and afterwards the cause went to trial on the several issues which had been taken. And the issues relating to the defendants' prescriptive right to dig gravel and sand being found for them, the jury were discharged from giving any verdict on the other issues, on the ground that the lord could not inclose under the statute of *Merton* against such right, or any right of estovers. The master taxed the defendants' costs on the *postea*, but did not allow them the costs of the demurrers.

Duberley v. Page and another, B. R. P. 28 G. 3. 2 Term Rep. 391.

A MOTION was made, on the part of the plaintiff, that the master might tax the plaintiff the costs occasioned by the demurrers, and that the amount of such taxed costs might be deducted out of the costs allowed to the defendants on the *postea*. And it was contended that under the 4 *Anne*, c. 16. the plaintiff was entitled to the costs of the demurrer which had been adjudged for him, notwithstanding the defendants

were entitled to judgment on the whole record; and the case of *Greenhow* v. *Isley* was cited in support of this doctrine.

In opposition to the rule, it was insisted, that, as it appeared on the whole of the record, that the plaintiff had no cause of action, he was not entitled to have any costs deducted. The defendants were clearly entitled to a general judgment on the record, for though in fact only one issue was tried, which was on the right to dig sand and gravel, yet that being found for the defendants, was decisive against the right set up by the lord to inclose, and there was no occasion to enter upon the other issues. As the point on which the demurrer turned was totally collateral to the merits and gist of the cause, the plaintiff has unnecessarily incurred that expence by arguing it before the trial; for if he had waited till afterwards, the arguing of the demurrer would have been nugatory. The Court are not bound by the statute of *Anne* to allow the plaintiff his costs on the demurrer. They have a discretion which goes to *all* the costs, as well as to the *quantum*; such a discretionary power as a judge at *Nisi Prius* has of granting a certificate under the same section of the act.

Buller, *Justice*.—This verdict proceeded on the ground which the defendants' counsel have stated, but the question now is, whether under the statute of *Anne* the plaintiff has a right to the costs of the demurrers which were adjudged in his favour? Before this act of parliament only one plea could be pleaded, when records were of course less expensive than they are at present. The meaning of the

legislature in passing that act was, that though they would grant an indulgence to a defendant, by permitting him to plead several pleas, yet it should not be prejudicial to the plaintiff; and therefore the costs of double pleadings are by the statute left in the discretion of the Court. Then it is material to consider, whether, under this clause of the act, the *quantum* of the costs only is left to the discretion of the Court? or whether a discretion is vested in them, whether they will or will not allow *any costs at all?* I am of opinion that on this clause the plaintiff is entitled to costs, and that the *quantum* only is in the discretion of the Court. The form of entering the judgment for costs in all cases states it to be by the discretion of the Court, but that is only as to the *quantum*. With regard to the latter part of this clause, if a verdict had been found for the plaintiff on the issues, *primâ facie* he would have been entitled to costs: and I have never known any instance of a judge at *Nisi Prius* certifying in favour of the party pleading double when the issues on those pleadings are found against him; for it is but just that the party who has created that expence should pay it. Then it is said that the plaintiff should not have argued the demurrer till after the issues had been tried, in order to avoid the expence of the demurrer; but that argument is not well founded, because an expence is immediately incurred by the pleadings. The plaintiff had a right to argue the demurrer either before or after trial; I have always thought it better to argue it before the trial, because a demurrer may put an end to the whole. This falls very much within the reasoning in the case of *Dodd* v. *Joddrell*, which was argued in the last term, Pou.
where the defendant in replevin was allowed the costs of the

issues found for him out of the general costs of the verdict, though some issues were found for the plaintiff which entitled him to judgment. There the Court reasoned on the plea itself, holding every thing afterwards to be consequent upon it. In the present case, the demurrer was in consequence of the bad plea pleaded by the defendants; and as the plaintiff had judgment on that plea, he is likewise entitled to the costs of it.

GROSE, *Justice*.—I agree with my brother BULLER, that our discretion on this act of parliament only relates to the *quantum* of the costs which the party is entitled to. In this case it is highly fit that the costs of this bad pleading should fall on the person who was the cause of that pleading; otherwise it would be right to correct the mode of pleading as many pleas as the party chooses. This double pleading is not allowed as of course in the Court of Common Pleas, where they refuse their assent to particular pleas which they think are vexatious. As to the objection that the plaintiff should not have argued the demurrer before the trial, the answer which has been given to it is decisive; for if the plea be good, it may put an end to the suit, and thus may be the means of saving expence. On the true construction, therefore, of this statute, I think that our discretion is confined to the *quantum* of the costs; and that the plaintiff, who has obtained a judgment on the demurrer, is entitled to the costs of this plea. Rule absolute.

M. 29 G. 2. B. R. Say. Rep. 260. *Sed quære.*

IN the case of *Hovard* v. *Chesbire*, before alluded to, the defendant, by leave of the Court, pleaded, in an action of

trespass, not guilty and a justification; there was a verdict for the plaintiff on both pleas, damages one penny, and the judge did not certify that the defendant had a probable cause to plead the second plea, but he certified, pursuant to the statute 43 of *Eliz.* c. 6, that the damages were under forty shillings. The plaintiff moved for the costs of the special plea.

AND by DENISON, *Justice.*—It hath been said that, because the judge hath not certified, that the defendant had a probable cause to plead the special justification, the plaintiff is entitled to the costs of that plea, it having been found for him, under the statute of 4 *Ann.* c. 16; but the words of that statute are only, that costs shall in such case be given at the discretion of the Court; and it has been resolved at a meeting of all the judges, that if there be a certificate upon the 43 *Eliz.* the plaintiff shall not have the costs of any plea pleaded with leave of the Court, although the issue thereon joined be found for him, and the judge have not certified upon the statute of *Anne.*

ALTHOUGH the word "*avowant*" doth not occur in the fifth section of the statute of 4 *Anne*, it is obvious, from the penning of the latter part of that clause, that it must have been omitted from mere accident; the fourth section enables a plaintiff in replevin to plead several matters in bar, by leave of the Court, and the fifth provides that, if any such matter be judged insufficient on demurrer joined, or a verdict be found upon any issue for the plaintiff or demandant, costs shall be given at the discretion of the Court, *unless* the judge shall certify that the said *plaintiff in replevin* had a probable cause

to plead such matter; now a certificate could hardly be said to be given in order to excuse the plaintiff from paying the costs, unless the defendant would be, without such certificate, entitled to receive them. And it hath been accordingly held that, although some issues in replevin may be found for the plaintiff, which entitle him to judgment, the defendant is entitled to the costs of other issues found for him, unless the judge certify that the plaintiff had probable cause to plead the matters on which the issues found against him are joined.

Cremer v. Dent P. 24 G. 2. Barnes, 141.

In the first case, in which this point appears to have been agitated, there was no decision, but it furnishes a strong inference, that the Court inclined in favour of the avowant's right to costs. The case was, in an action of replevin four several issues were joined upon four several pleas in bar to an avowry; three of which were found for the plaintiff, and the fourth for the defendant; and the judge not having certified that the plaintiff had a probable cause to plead the fourth plea in bar, the defendant moved for the costs of that plea, and obtained a rule to shew cause. However the rule was afterwards discharged, the judge having certified, after the motion and before cause shewn, in the plaintiff's favour; but the plaintiff was ordered to pay the defendant the costs of the application.

Bright v. Jackson, H. 28 G. 2. Barnes, 144. 246.

In a subsequent case, wherein the question was precisely the same with that in *Cremer* v. *Dent*, after enlarging a rule which had been obtained by the defendant to shew cause, the Court directed the prothonotary to tax the avowant's costs

on the pleas found for him, and that the same should be deducted out of the costs allowed to the plaintiff on the other part of the record.

AGAIN, in an action of replevin, the defendant pleaded *non cepit*, and then made cognizance as bailiff of *J. Horne*. The plaintiff after taking issue on *non cepit*, and traversing the defendant's being bailiff of *J. Horne*, pleaded two pleas in bar; the first, a licence to him from *J. Horne* to put his cattle in the place in question; the second, that the place in question was parcel of *Postcomefield*, and set up a right of common thereupon. The replication first traversed the licence from *J. Horne* to the plaintiff; and, secondly, protesting against the right of common, traversed the place in question being parcel of *Postcomefield*. The first and last issues were found for the plaintiff, the second and third for the defendant. And the judge, before whom the cause was tried, did not certify that the plaintiff had a probable cause for pleading his pleas in bar; the master in taxing the plaintiff his costs having only deducted for the defendant the costs of the third issue,

Dodd v. Joddrell, B. R. H. 28 G. 3. 2 Term Rep. 235.

A MOTION was made that the master should be directed to allow the defendant the costs of the verdict; or at least to deduct for him the costs of the second, as well as of the third issue. The counsel was beginning to argue the defendant's title to the costs of the verdict, but was stopped by the Court, who desired him to confine himself to the second point, as they were of opinion that the plaintiff was clearly entitled to the costs of the verdict. The arguments on this point chiefly

turned on the penning of the fifth clause of the statute of *Anne*, which, it was said, plainly proved, that the legislature must have intended to comprehend avowants therein. And it was said, as the master had already allowed the defendant the costs of the third issue, which was found for him, it was equally reasonable that he should have those of the second.

THE *Court* were clearly of opinion, that the defendant was entitled to deduct the costs of the second as well as of the third issue; and

BULLER, *Justice*,—added—the difficulty of the master seems to have arisen from the term "overpleading;" for he conceives that although some of the issues are found for the defendant, yet, if the plaintiff did not unnecessarily plead the matter upon which those issues were taken, and was entitled to the general costs of the verdict, the costs of those issues ought not to be deducted. But I take it that overpleading means, pleading matter not true in point of fact, which is found against the party pleading it, and yet he is entitled to a verdict. It makes no difference whether the plaintiff in replevin pleads new matter out of the cognizance, on which issue is joined, and it is found against him; or whether he takes issue on the cognizance itself, and that is found against him. The general rule is this; where several matters are pleaded by the plaintiff, some of which are found for him, and the others for the defendant, and the plaintiff is entitled to judgment, if the judge, who tried the cause, certify that there was a probable cause for pleading those pleas, the master is not to deduct the costs of those issues so found for the de-

fendant; but if there be no certificate, the defendant is entitled to have those costs deducted for him. Ordered accordingly.

An avowant hath been determined to be a *defendant* within the meaning of the statute of 4 *Ann.* c. 16. and therefore if there are several avowries, some of which are found for the plaintiff, and the others for the defendant, the plaintiff is entitled to the costs of the issues found for him, if the judge, who tried the cause, do not certify a probable cause for pleading those avowries, even though, on the whole, the plaintiff should appear to have no cause of action.

Thus, in replevin, there were several avowries on the record, and issues joined on all; and the jury having found for the plaintiff on all but one issue, on which a case was reserved for the opinion of the Court and adjudged, on argument, for the defendant, a rule was obtained to shew cause why the master should not allow the defendant the full costs on all the issues. To this end it was contended, that a defendant or avowant in replevin, is an actor, and to many purposes considered in law as a plaintiff. That different avowries, therefore, ought to be looked upon as different counts in a declaration, and that when separate issues are found on different counts, and any one of them is found for the plaintiff, he is allowed the costs of the whole record. That by the fifth section of 4 *Anne* if any special matter pleaded by virtue of that statute by any *defendant, tenant,* or *plaintiff in replevin,* shall be judged insufficient on demurrer, or found for the plaintiff or demandant, costs are given; but that it could

Stone v. Forsyth, B. R. T. 22 G. 3. Doug. 709. n. (2).

not be supposed, that in the general words "*defendants* or *tenants*," were included *avowants* or *defendants in replevin*; and if they were not included, they ought, upon general principles, to have their full costs, in such a case; because, if any one of the avowries is found against the plaintiff, it shews that he had no cause of action.

BUT on shewing cause Lord MANSFIELD, WILLES, and BULLER, *Justices*, (ASHURST, *Justice*, being absent), were clear that an avowant is a defendant within the meaning of the act, and said, it had always been so considered in the taxation of costs. Indeed if it were not so, there would be no authority under sect. 4. to plead different avowries.

IF the plaintiff take issue on several pleas in bar, one of which is insufficient in point of law, and obtain a verdict on all the issues, except that joined upon the insufficient plea, which is found for the defendant, he is not entitled to the costs of the issue found for the defendant, although judgment may be entered up for him (the plaintiff) on the other issues found in his favour;—he ought to have demurred to the bad plea.

Kirk v. Nowill and another, B.R.P. 26 G. 3. 1 Term Rep. 266.

As where, to an action of trespass, the defendant pleaded the general issue, and three special pleas of justification; at the trial whereof a verdict was given for the plaintiff on the general issue and the two first justifications, and for the defendant on the last justification. A rule having been made to enter up judgment for the plaintiff on the general issue and the two first pleas of justification, notwithstanding the verdict for the defendant on the last justification, the same

being insufficient in point of law, the defendant obtained a rule to shew cause why the master in his taxation of costs should not allow such costs only as were incurred upon the issues found for the plaintiff, without allowing to the plaintiff any costs upon the issue found for the defendant. On shewing cause against the rule it was said, that as the defendant had pleaded an insufficient plea, the plaintiff was entitled to the costs of that plea. That if the plaintiff had demurred either to the plea or to the rejoinder, and had judgment, he would have been entitled to the costs; and it was immaterial in what stage of the cause the plaintiff had judgment.

BULLER, *Justice*.—All the late cases are decidedly against the plaintiff. Suppose the judgment had been arrested, no costs would have been given. The reason is obvious; the plaintiff has contributed to the costs as well as the defendant. He should have demurred to the defendant's plea; and by going on to trial, he is equally in fault.

Per Curiam. Rule absolute.

IF the defendant plead, by leave of the Court, not guilty, and not guilty within six years, upon the former of which issue is joined, tried, and found for the plaintiff, and to the latter there is a demurrer, which, on argument, *subsequent* to the trial of the general issue, is adjudged for the defendant;—neither party shall have the costs of the trial, but the defendant shall have those of the *demurrer*. Thus,— Cooke v. Sayer, B. R. H. 32 G. 2. 2 Burr. 753. S. C. 2 Wils. 85.

IN an action of trespass and assault for criminal con-

versation with the plaintiff's wife, the defendant, by leave of the Court, pleaded not guilty, and not guilty within six years. Issue was joined on the former plea of not guilty; to the latter the plaintiff demurred. Prior to any argument upon the demurrer, the issue joined on the plea of not guilty was tried, and found for the *plaintiff*, with 50*l.* damages; afterwards the demurrer was argued, and adjudged for the *defendant*, and each party had judgment; *viz.* the plaintiff on his verdict, and the defendant on the demurrer. Upon these facts a motion was grounded for the direction of the Court to the master how to tax the costs.

After taking a few days to consider of it, the resolution of the Court was delivered by Lord Mansfield, to the following effect;—

The two pleas pleaded by the defendant have received different determinations; one is found against the defendant, the other has been adjudged for him. So that the plaintiff *upon the whole* has *no* cause of action.

We are all of opinion, that the *particular circumstances* of this present case are such as may very well suffice for our determining it upon these circumstances alone, without going into the *general* question;—the *general* question is a point that might require a good deal of consideration.

Now, upon the present circumstances, it is clear, that the defendant must certainly have the costs of the *demurrer* which hath been adjudged for him.

BUT as to the costs of the *trial*—we think that the plaintiff ought *not* to have them, though he has obtained a verdict upon this issue: for, upon the whole, he had *no* cause of action. The demurrer is decisive as to *that*. And he has acted unadvisedly, in carrying this issue down to trial, before the determination of the demurrer.

WE cannot say that the defendant did *wrong* in pleading not guilty, as well as not guilty within six years; we cannot determine that he had no pretence for so doing, and therefore we cannot say that he ought to *pay* costs merely for that cause. And yet, on the other hand, that plea being found *false*, he ought not to *receive* costs of the plaintiff, upon the trial of that issue which has been found against him.

BUT nevertheless, though it is found against the defendant, yet the plaintiff cannot have *damages* upon it, because upon the whole judgment must be against him: and therefore neither can he have *costs* upon it. So that the judgment must be for the *defendant* clearly, and he must also have the *costs* of the *demurrer*; but upon the *trial* there are to be *no costs on either side*; but each party is to sit down by his own costs.

N. B. THERE was no rule drawn up in form; this declaration of the Court being only for the direction of the master, how to tax these costs.

WHERE there are different issues joined on different *pleas*, on some of which a verdict is found for the plaintiff, and on Doug. 678.

others for the defendant, the defendant, by the practice of the Court of King's Bench, will be entitled to the costs of the issues found for him; though it should seem that a different practice prevails in the Common Pleas.

Vide Lloyd v. Day, T. 32 and 33 G. 2. Barnes, 134.

Vide post.

But it is different where there are issues joined on several *counts*, and on some a verdict for the plaintiff, and on others for the defendant; for there the defendant shall not, in either the Court of King's Bench, or Common Pleas, have any costs upon that part of the record on which the verdict is found for him.

Bartlet *and* Spooner P. 1751. C. B. S. C. Barnes, 461. somewhat differently stated.

In trespass, the defendant pleaded not guilty, and several justifications; upon the trial, the plaintiff not proving his possession in the *locus in quo*, the defendant had a verdict, which, by the direction of Denison, *J.* was entered upon the general issue only; upon which there was a motion for a *venire de novo*,—but the Court refused the motion, saying that the verdict was complete, and determined the cause, that the plaintiff was not entitled to damages; though they said the plaintiff might have insisted upon having a verdict entered on the other issues, which would have entitled him to the costs of those issues, unless the judge should have certified that the defendant had probable cause for pleading the same.

S. P. Dayrel v. Briggs. B. R. T. 25 G. 2.

Cremer v. Dent, P. 24 G. 2. Barnes, 141.

A certificate upon the statute 4 *Anne*, c. 16. s. 5. need not be made in court, at the trial, but will be effective if made afterwards; even though it should be granted after an application by the plaintiff, for the costs of a special plea, for want thereof.

CHAPTER II.

OF A DEFENDANT'S RIGHT TO COSTS.

SECT. I.

Of Costs where the Plaintiff is nonsuited, or a Verdict is found for the Defendant.

SECT. II.

Where a Plaintiff neglects to declare in due Time, or, after Declaration, discontinues his Suit.

SECT. III.

Where there are several Defendants, and one or more of them acquitted, by Verdict, at the Trial.

SECT. IV.

Where there is Judgment for the Defendant, on a Demurrer.

SECT. V.

Where an Action is instituted in a superior Court, for a Matter, or against a Person, within the Jurisdiction of, or amenable to, a Court of Conscience, or Requests.

SECT. I.

Of Costs where the Plaintiff is nonsuited, or a Verdict is found for the Defendant.

52 H. 3. c. 6. IT is unnecessary to make any particular observations on the statute of *Marleberge*, c. 6. which only entitled a defendant to costs in a writ of right of ward, when the suit was malicious, since that statute, or at least that part of it, being calculated for the support of our ancient military tenures, with them became extinct in the reign of *Charles* the Second.

IN no other case, were any costs allowed a defendant, by either the common or statute law, till the twenty-third year of King *Henry* the Eighth. However, now, by a variety of statutes, a defendant, when he prevails, is entitled to the same costs as the plaintiff would have had, in case he had recovered.

23 *H.* 8. c. 15. s. 1. enacts, " That if,—in any action,
5 R. 2. stat. 1. c. 8. " bill, or plaint, of *trespass* upon the statute of King *Richard*
" the Second, for entries into lands and tenements where no
" entry is given by law,—or of *debt* or *covenant*, upon any
If the plaintiff be nonsuited, or a verdict pass against him in certain actions, the defendant shall have costs. " specialty made to the plaintiff or plaintiffs, or upon *any*
" *contract* supposed to be made between the plaintiff or
" plaintiffs, and any other person or persons, or of *detinue* of
" any goods or chattels on a supposed right of property, or
" of *account* charging the defendant as bailiff or receiver, or

" *upon the case*, or upon *any statute* for any offence or wrong " personal immediately supposed to be done to the plaintiff, " —the plaintiff, after appearance of the defendant, be non- " suited, or that any verdict happen to pass, by lawful trial, " against the plaintiff, the defendant, in every such action, " bill, or plaint, shall have judgment to recover his costs " against the plaintiff, to be assessed and taxed at the dis- " cretion of the Court, and shall have such process and exe- " cution for the recovery and having his costs against the " plaintiff, as the plaintiff should or might have had against " the defendant, in case the judgment had been given for the " plaintiff."

THE 24 *H.* 8. c. 8. exempts plaintiffs, suing to the use of the king in any action whatsoever, from the payment of costs, in case they be nonsuited, or a verdict pass against them.

The defendant, if he prevail, to have costs in all cases where the plaintiff would have had them, in case he recovered.

4 *Jac.* 1. c. 3. enacts, " That if any person shall com- " mence or sue in any court of record, or in any other court, " any action, bill, or plaint of trespass, or *ejectione firmæ*, or " any other action whatsoever, wherein the plaintiff or de- " mandant might have costs (in case judgment should be " given for him) and the plaintiff or demandant in any such " action, bill, or plaint, after appearance of the defendant, " be nonsuited, or that any verdict happen to pass, by any " lawful trial, against the plaintiff or demandant, that then " the defendant in every such action, bill, or plaint, shall " have judgment to recover his costs, to be assessed, taxed, " and levied in manner and form as costs are to be assessed, " taxed, and levied in certain actions in and by the law of " the three-and-twentieth year of King *Henry* the eighth."

For cases upon the 23 H. 8. c. 15. see 1 Bac. Abr. 517. *in notis.*

IT would be both a tedious and useless task to enter into a minute detail of such decisions upon the 23 *H.* 8. c. 15. as only go to determine what species of actions are comprehended within the words of that act; since the 4 *Jac.* 1. c. 3. has rendered a knowledge of most of those decisions a matter of very small importance, by affording a defendant the same right to costs, on a nonsuit, or verdict in his favour, in *every* action, where, on a recovery by him, the plaintiff would have had them, as was done by 23 *H.* 8. in the particular actions therein enumerated.

Alsop v. Cleydon, Cro. Eliz. 465. S. C. Moore, 406. but not S. P. Vide Hetley, 144. semb. contra, 1 Lill. Pr. Reg. 572. G. acc.

WHERE judgment is given for a defendant upon a *special* verdict, he shall have his costs as well as upon a general verdict; for the former is equally a verdict for him, for whom it is found as the latter, and, after judgment thereon, there is no difference, but it is the same, as if a general verdict had been originally given for the defendant.

IT appears from the greater number of authorities, that a defendant is entitled to costs on a nonsuit, or verdict, in a species of action, wherein the plaintiff, on a recovery, would have had costs, although it should be obvious upon the face of the declaration, in that particular case, that the plaintiff had no cause of action.

Ladd v. Wright H. 43 Eliz. Moore, 625.

THUS, in an action of debt upon a bond for the performance of an award, the breach being alleged in a matter not within the submission, and issue joined thereon, the plaintiff at *Nisi Prius* was nonsuited; a motion was afterwards made for the purpose of saving costs, under the 23 *H.* 8. c. 15, that the judgment might be given upon the insufficiency of the

declaration, and not upon the nonsuit, but the Court rejected the application, and held that the defendant should have costs, they being given for the vexation.

But in the case of *Blythe* v. *Topham*, a similar motion succeeded; this was an action upon the case for digging a pit in a common, *per quod* his mare, being straying there, fell into it and perished, and on not guilty, verdict for the defendant; the plaintiff, to save costs, moved in arrest of judgment that the declaration was not good, he not shewing any right therein, why his mare should be in the common, and therefore it is *damnum absque injuriâ*, and of that opinion was the whole Court; wherefore it was adjudged upon the declaration, that the bill should abate, and not upon the verdict.

Blythe v. Topham, Cro. Jac. 158. Vide etiam, 3 Lev. 322. Hetley, 146.

However, the principle laid down in *Ladd* v. *Wright* has been very equitably adopted in a variety of subsequent decisions; wherein, conformably to that case, it has been decided that, notwithstanding the declaration may be insufficient, the defendant shall have costs, if he obtain a verdict, or the plaintiff be nonsuited. And, indeed, it would be unjust, in such a case, to deprive a defendant of his costs, merely because the action brought against him is erroneous, as well as wrongful.

Dy. 32. b. *marg.* 3 Bulstr. 248. Hutt. 16. Hob. 219. 284. Cro. Car. 175. Godb. 345. Palm. 147. 365. 2 Ro. Rep. 213. 327. Style, 149. 153. 2 Ro. Rep. 88.

But where at the trial of a cause, a verdict was found for the plaintiff, and two points were reserved for the opinion of the Court; one of which was a ground for arresting the judgment, and the other for entering a nonsuit, and both of them,

on argument, determined against the plaintiff, the Court refused to order a nonsuit to be entered, but arrested the judgment, and thereby fixed each party with his own costs, as the defendant might have demurred to the declaration, and as his conduct in the transaction, in which the action originated, appeared to have been somewhat reprehensible.

Cameron v. Reynolds, B. R. H. 16 G. 3. Cowp. 403.

THIS was a special action upon the case, brought against defendant for a *breach* of the *duty* of his office, which was stated in the declaration to be that of *under-sheriff*. Plea not guilty. Verdict for the plaintiff.

AT the trial, three points were saved for the opinion of the Court; two of which are only material to this question. 1st. Whether the action would lie against the defendant, the *under-sheriff*? 2dly. Whether the plaintiff was not precluded from bringing this action, having already, on motion, obtained specific relief, by a rule of Court, against the high-sheriff, for the injury complained of?

A RULE was obtained to shew cause why a nonsuit should not be entered, or why the judgment should not be arrested. After argument,

LORD MANSFIELD said, the Court were unanimously of opinion, that the action did not lie against the *under-sheriff*; all actions for breach of duty in the office of sheriff, must be brought against the high-sheriff, as for an act done by him, though it proceeds from the act of the under-sheriff or bailiff. This objection, which arises on the face of the declaration,

goes in arrest of judgment. And as to the second objection, we are of opinion, supposing the action would well have lain against the defendant, that, under the circumstances of this case, the plaintiff has precluded himself from bringing this action, having already complained against the high-sheriff by motion, and upon such motion obtained an adequate recompence by rule of court, for the identical injury now complained of.

The question that arises upon these two points, one of which is a ground for arresting the judgment, and the other for a nonsuit, is what the Court should do. If we order a nonsuit to be entered, the plaintiff must pay the defendant his costs; but if we arrest (*a*) the judgment, each party must pay their own costs. Upon the whole, taking all the circumstances and complexion (1) of the case into consideration, we think the defendant ought to prevail upon the motion in arrest of judgment, more especially as it appears upon the declaration that he might have demurred.——Judgment arrested.

(*a*) Barnes, 143. Gilb. H. C. P. 272. Fisher v. Kitchingman. Barnes, 284. 1 T. R. 267.

Lord Mansfield added, that the proper mode would have been for the defendant to have applied to the Court to stay the proceedings in this action.

If the plaintiff be nonsuited, the defendant shall have costs, although he may have pleaded an insufficient plea in bar.

Laiston's Case, M. 11 Jac. C. B. Godb. 220.

(1) It appeared, in evidence, at the trial, that the defendant, in the injury transaction, which occasioned the suit, had acted contrary to the recommendation of the high-sheriff.

Ilatt v. Lisset, H. 1 G. 2. Cas. Pr. C. P. 39.

So the defendant shall have costs under 4 *Jac.* 1. c. 3, where the plaintiff is nonsuited in a *bomine replegiando.*

Greetham v. the Hundred of Theale, B. R. T. 5 G. 3. 3 Burr. 1723.

Or, in an action by the party grieved, against the Hundred, upon the statute 9 *G.* 1. c. 22. s. 7.

Read v. Grapler, Raym. 38.

The declaration upon the *Nisi Prius* roll varied from the Plea roll; and at the assizes the plaintiff was nonsuited. After which, upon motion, a *distringas de novo* was awarded, the nonsuit being immaterial; the defendant insisting on having the costs of the nonsuit,—the Court directed precedents to be searched; and the report adds, that it seems he shall have costs at the discretion of the Court;—but no judgment appears to have been given.

Done v. Knot, M. 18 Jac. 2. cited Godb. 329.

In ejectment the defendant shall have costs, where the jury find for him, notwithstanding the plaintiff may have mistaken his *venire facias.*

But these statutes do not extend to give costs in a writ of attaint.

Daly v. Bellamy, Cro. Car. 542. S.C. March 24. W. Jones, 432.

As where attaint was brought by the plaintiff in an action of assault and battery, and the verdict affirmed, it was held, that the defendant should have no costs in the attaint; for if the first verdict had passed for the plaintiff, whereby he should have had costs; or if the verdict had passed against him, and he had brought attaint, and the jury had thereupon been attainted, he should have such costs only as he would have had in the first action, if it had been found for him, and

no more in respect of the attaint. So *è converso*, where the first verdict passes for the defendant, and upon attaint the verdict is affirmed, he shall only have the costs of the first verdict.

NEITHER shall the defendant have costs if the plaintiff be nonsuited in an *assize*. 1 Brownl. 28, 29.

NOR where there is a default in the original writ, and the plaintiff is afterwards nonsuited; because when the original is abated, it is as if no suit had ever been. Laiston's Case, Godb. 220.

So where there is a plea in abatement, which the plaintiff confesses to be true, and enters a *nil capiat per breve*, the defendant is entitled to no costs. Greenhill v. Shepperd, B. R. M. 9 W. 3. 12 Mod. 145. S. P. Allen v. Maxey, M. 8 G. 2. Barnes, 120. 1 Str. 638. acc.

BUT if issue be taken on a plea in abatement, and the plaintiff, afterwards, at the assizes, be nonsuited, the defendant shall have costs upon the nonsuit; because, if the issue had been found for the plaintiff, it would have been peremptory, and he would have had costs. Aplin v. Constable, T. 13 G. 1. Cas. Pr. C. P. 35.

IF a defendant remove proceedings from a county court by a *recordari facias loquelam*, into one of the superior courts, and sign judgment of *nonpros* for the non-appearance of the plaintiff, he shall have costs.

THUS where, an action brought in the county court of *Monmouth*, having been removed by the defendant into the Court of King's Bench by a *recordari facias loquelam*, the Davies v. James, B. R. M. 27 G. 3. 1 Term Rep. 371.

plaintiff's attorney obtained an order for time to declare; and a few days afterwards, hearing from the plaintiff that he would not proceed, because the cause in the inferior court had been commenced to recover only three shillings, gave notice thereof to the defendant's attorney, who signed judgment of *non-pros.*

THEN the defendant obtained a rule to shew cause why the master should not tax his costs.

AND, in support of the rule, it was contended, that the word *nonsuit*, as used in the statutes giving costs to defendants, extends to *nonpros*; for it means any relinquishment of the suit. The master's doubt arose from a *dictum*, to be found in the books of practice, that when the defendant removes a cause from an inferior court, he cannot *non-pros* the plaintiff for not declaring, because the plaintiff is not bound to follow him. But that rule only holds in cases where the cause is removed by *habeas corpus*, and not by *recordari*; which distinction is evidently founded on this reason, that in the former case the record itself is left in the inferior court, and only an account or history of the proceedings transmitted to the superior one, *Salk.* 352; but in the latter case, the original process is made a record of this court. Besides, in this particular case, the plaintiff hath applied for a rule to declare, which brings him into court as much as if he had actually filed his declaration.

BULLER, *Justice*,—The master thought in this case that he was not at liberty to tax the defendant his costs under the

13 *Car.* 2. st. 2. c. 2; and I agree with him in that; because that act is confined to suits commenced in the superior courts. But the statute of 4 *Jac.* 1. c. 3. makes this matter very clear, which says that, if a party is entitled to his judgment, he is entitled to costs. Then the question is, whether the defendant is entitled in this case to his judgment? that depends on the nature of a *recordari*. There is no such distinction between an *babeas corpus* and a *recordari* as the defendant's counsel has taken, as far as relates to this point; for a *babeas corpus* does remove the suit. Lord *Chief B.* GILBERT, in his Law of *Replevin*, 148, says, in a *babeas corpus*, the plaintiff must follow the body of the prisoner. Post 137.

THE general rule is, that where, by the writ, each party has a day in court, and the defendant may be damnified by not appearing, he may appear and demand the plaintiff, and this even though the writ be not returned; as upon a *capias*, *exigent*, or *distringas*. 38 *Ed.* 3. 20. 3 *H.* 7, 8. *pl.* 10. *Gilb. Law of Rep.* 138. Then what is a writ of *recordari*? It is a summons to both parties; for it requires the sheriff to record the plaint, to have it in court on a certain day, and to prefix that day to both parties, that they may be there. *Fitzb. N. B.* 70. By this writ, therefore, both the parties have a day; and the defendant, being bound to appear, may be damnified if he does not: then if the plaintiff do not appear, the defendant is entitled to judgment. It follows from hence, that he is likewise entitled to his costs; not indeed on the statute of *Charles* the Second, but on that of 4 *Jac.* 1. c. 3. whereby if any person shall commence any action in *any* court, &c. which words are not confined to *superior courts*.

Per Curiam. Rule absolute (1).

It should seem that a defendant ought to be allowed all such costs upon a nonsuit, as have been incurred in taking the necessary measures for his defence in the action.

Rex v. Midlam, B. R. T. 5 G. 3. 3 Burr. 1720.

As where a man, notwithstanding he had been already convicted before a justice of the peace, upon the game laws, and paid the forfeiture upon such conviction, was sued by action for the *same* offence; and when he wanted to plead this conviction in bar of the action, the justice refused to give him a copy of it, which obliged him to remove it by *certiorari* into the Court of *King's Bench*, where, at the instance of the prosecutor, it was set down in the paper, and affirmed; and afterwards, the prosecutor became nonsuited in the action;—under these oppressive circumstances, it was said by Lord Mansfield and Mr. *Justice* Yates, that the defendant, in the taxation of costs upon the nonsuit, ought to have been allowed the expence of his *necessarily* bringing this *certiorari* to remove the conviction, because it was *necessary to his defence* in the action.

Davila v. Herring, B. R. P. 6 G 1. 1 Str. 300. Sed vide post.

Upon the trial of a cause a case was reserved, and afterwards argued in court, but the facts not being sufficiently stated to enable the Court to give judgment, the parties, on the recommendation of the Court, agreed to go to a new trial; where the plaintiff was nonsuited. And the question now

(1) To a question from the bar, whether it was to be understood that the decision had been made solely on the ground of the plaintiff's having appeared in this Court by the order for time to declare? The Court (*Ashurst* and *Buller*, Justices) answered in the negative.

was, whether the master should tax the common costs of a nonsuit, or take into his consideration all the former proceedings? Upon motion for the direction of the Court, the master was ordered to tax the defendant his costs upon the whole, as well with relation to the first trial as the last.

IT was moved upon the statute (*a*) for setting off mutual debts, that no costs should be allowed the defendant, because he had not obtained a verdict, there being only an endorsement that 13 *l.* was due to the plaintiff for rent, and that on balancing the accounts, there appeared due to the defendant 13*s.*; but the Court declared that the endorsement was equally a verdict to entitle the defendant to his costs, as a verdict in other cases.

Geale v. Chapman, T. 5 G. 2. Cas. Pr. C. P. 65.
(*a*) 2 G. 2. c. 22. 8 G. 2. c. 24.

IF the plaintiff be nonsuited in an action of ejectment against several defendants, he may pay the costs to any one of the defendants at his election.

Jordan v. Harper, B. R. P. 8 G. 1. 1 Str. 516.

AND if the plaintiff be nonsuited for a fault in his declaration, though divers defendants appear severally, yet they shall have only the costs of one nonsuit.

2 Com. Dig. 550.

AN action of debt lies in the Court of King's Bench for the recovery of the costs of a nonsuit in an inferior court, though such costs may not amount to forty shillings.

Harward v. Furborne, Cro. Eliz. 96. S. C. 1 Leon. 316. S. P. Murray v. Wilson, B. R. H. 25 G. 2. 1 Wils. 316.

WHERE a plaintiff is nonsuited upon the trial, the defendant ought to pay the jury, which will be afterwards allowed him in the costs of the nonsuit.

Vide 4 T. R. 495. 1 Lill. Abr. 471 (*A*)

Darlow v. Collison, T. 24 G. 2. B. N. P. 335.

ONE defendant gave a general release to the plaintiff, after the costs of a nonsuit had been taxed, and, upon motion, he was ordered to pay the other defendants their shares.

SECT. II.

Of Costs where a Plaintiff neglects to declare in due Time, or, after Declaration, discontinues his Suit.

Costs, damages, and charges shall be awarded to the defendant, where the plaintiff doth delay his suit, discontinue, or is nonsuited in the *King's Bench*.

THE statute of 8 *Eliz.* c. 2. recites—"That whereas divers "persons of their malicious minds, and without any just "cause, do many times cause and procure others of the "queen's subjects, to be very much molested by attach- "ments and arrests made of their bodies, as well by process "of *latitat*, *alias*, and *pluries capias*, sued out of the Court "called the *King's Bench*, as also by plaint, bill, or other "suit in the Court of the Marshalsea, and within the city of "*London*, and other cities, towns corporate, and places where "any liberty or privilege is to hold pleas of debt, trespass, "and other personal actions; and many times there is no de- "claration or matter laid against the parties so arrested or "attached, and so they are maliciously put to great expence, "without just or reasonable cause, and, yet, hitherto by law, "the party so grieved and vexed could never have any costs "or damages. For remedy whereof, be it enacted, That "when and as often as any person shall sue forth, or cause or "procure to be sued forth, of the said Court commonly called "the *King's Bench*, any of the writs or process before men- "tioned, against any person, upon which such person shall

" be arrested, or appear upon the return thereof, and put in " bail to answer such suit as shall be objected against him, " that then in every such case, if the party, at whose suit or " procurement the same writ or process was sued forth, do " not, within three days next after such bail taken, put into " the same court his declaration; or if, after declaration " had and put into court, the plaintiff shall not prosecute " the same with effect, but shall willingly and apparently to " the same court suffer his suit to be delayed, or shall suffer " the same suit to be discontinued, or be otherwise non- " suited therein, the judges of the said court for the time " being shall, by their discretions from time to time, award " to every person so arrested, vexed, molested or troubled " by such writs, or suit, his costs, damages, and charges, " sustained by means of any such writs, process, arrest or " suit."

The third section of this act gives, in like manner, costs to a defendant attached or arrested to answer any suit in the Marshalsea Court, or any other of the inferior courts therein mentioned, in case the plaintiff do not declare in due time, or, afterwards, delay or discontinue his suit, or be nonsuited.

If the plaintiff do not declare before the end of the next term after appearance, a nonsuit may be entered, and the defendant shall have costs.

By 13 *Car.* 2. st. 2. c. 2. s. 3. " Unless the plaintiff, who " has sued a writ, bill, or process out of the Court of *King's* " *Bench* or *Common Pleas*, shall put into the court from " whence such writ, bill, or process did issue, his bill, or de- " claration against the person thereupon arrested, in some " personal action, or *ejectione firmæ* of lands or tenements, " before the end of the term next following after appearance,

"that a nonsuit may be entered in the said courts respectively, "and the defendant shall have judgment to recover his costs "against such plaintiff, to be assessed, taxed, and levied in "such manner, and as it is provided by the statute for costs "made in the twenty-third year of king *Henry* the Eighth."

It is observable, that the provision contained in the statute 8 *Eliz.* c. 2, with respect to the costs of a defendant, where the plaintiff in the Court of *King's Bench*, discontinues *after* declaration, is not extended by the 13 *Car.* 2. to the case of a similar discontinuance in the Court of *Common Pleas*. The reason generally assigned for this seeming omission is, that, as a plaintiff could not discontinue his suit in the Court of *Common Pleas* without an application to the Court for that purpose, it was customary to make the payment of costs to the defendant one of the conditions of a compliance with a motion for leave to discontinue; and therefore it was unnecessary to make any provision by statute, for the costs of a defendant in such a case.

2 Cro. Pr. 453. Say. Costs, 83.

1 Leon. 105. pl. 142.

If the plaintiff omit to declare within two terms, in an action against several defendants, there ought to be but one judgment of *nonpros* signed, for all the defendants, and not a *distinct* judgment for each of them.

Thus, where a *latitat* was awarded against four defendants, who were arrested thereon, and appeared severally by different attornies, and afterwards, the plaintiff not declaring in two terms, they signed four distinct judgments of *nonpros* against him, and thirty shillings costs were awarded to each

Anon. B. R. T. 12 W. 3. Com. 74. S. P. Allington v. Vavasor, B. R. T. 12 W. 3. Salk. 455. Pryce v. Foulkes and

of them; this proceeding was held irregular;—for by HOLT, *C. J.* though the plaintiff might declare against them severally, yet as the writ was awarded against them jointly, and the plaintiff was nonsuited before any declaration, there ought to be but one nonsuit for all of them.

others, B. R. 9 G. 3. 4 Burr. 2418. Contra, Anon. B. R. T. 8 Ann. Vin. Abr. Tit. Costs, 341. Vide Doug. 169. Tidd's Pr. 236. 2 T. R. 257.

IF the plaintiff sees occasion, or finds he cannot support his action, he may discontinue either before or after the delivery of a declaration, by motion *at the side bar, on payment of costs.*

Reg. M. 10 G. 2. B. R. note (*d.*)

AND it may be laid down as a general rule, that, in every case of a discontinuance by the plaintiff, *by leave of the Court*, the defendant is entitled to costs.

Comb. 299. 323. Bull. N. P. 322. Burt. Pr. Excheq. Off. Pleas, 155, 6.

BUT no costs are payable upon a discontinuance *in law*; nor upon a discontinuance after demurrer.

Comb. 323. Holt, 156. 1 Sid. 142.

AND where the plaintiff discontinues, by leave of the Court, in a species of action, wherein the defendant, in case he obtained a verdict, would be entitled to double costs, it must be upon the payment of *double costs.*

Devenish v. Martin, B. R. P. 7 G. 2. Bull. N. P. 332. S. C. 2. Str. 974. 2 Barnard, K. B. 373. 432. 449.

THE Court, on motion, gave the plaintiff leave, in one case, to discontinue where he was under a peremptory rule to try the next term, on condition of paying *good* costs to the defendant. And the plaintiff may discontinue after a *special*, though *not* after a *general* verdict.

Style, 366. pl. 3.

Salk. 178.

THE Court refused to permit the plaintiff to discontinue

Pym v. Warren, M. 6 G. 2. Barnes, 169.

after judgment on demurrer for him (but not entered upon record), and a writ of error brought and bail put in thereon, without payment of the costs of the writ of error.

Hester v. Hall, M. 16 G. 2. Barnes, 307.

If the countermand of a notice of trial be *regular*, and the plaintiff afterwards obtain a rule to discontinue upon payment of costs, the defendant will not be allowed, upon the taxation of the costs upon such rule, for any expences incurred between the time of giving the notice of trial, and the notice of countermand; as, for instance, not for the expences of a witness, who set out in the interval betwixt the notices, in order to attend the assizes.

Scott v. Perry, C. B. P. 11 G. 3. 2 Bl. 758.

Though no costs are payable in formedon, yet the plaintiff moved for leave to discontinue an action of that kind, on payment of costs. For the tenant, it was alleged that two ejectments had been brought for the same premises, which were dropped after the landlord had entered into the common rule, and it was therefore prayed that the payment of the costs incurred in these actions might be made a part of the terms of being allowed to discontinue the formedon.

But the Court refused to tack these costs to the present motion, leaving the parties to the ordinary remedy, and made the rule absolute.

This case is differently reported in 3 *Wils.* 206. where it is said, that, on motion for leave to discontinue, because of some mistake in setting out the estate-tail in the writ, the Court thought, that the plaintiff, as he was asking a favour,

ought to pay the costs of an ejectment brought for the same lands by the plaintiff, as well as those of the formedon; which was consented to by the plaintiff, upon being permitted to *amend* all the proceedings in the formedon, and that he had leave to amend accordingly.

THE entry of a *noli prosequi* by the plaintiff, is a discontinuance within the 8 *Eliz.* c. 2.

As where, after action brought and the declaration delivered, the plaintiff having discovered that the defendant was an infant, entered a *noli prosequi*; in consequence of which the defendant moved for his costs under the 8 *Eliz.* c. 2.

Cooper v. Tiffin, M. 30 G. 3. B. R. 3 Term Rep. 511.

IT was said on the other side, that this case neither came within the words nor the reason of the act of parliament. The words are only *discontinuance* and *nonsuit*; and there was good reason for not extending the statute to a *retraxit* or a *noli prosequi*, because by taking these steps, the party renounces his claim upon the defendant, and cannot afterwards commence another action for the same cause; whereas in the case of a *discontinuance* or *nonsuit*, a new action for the same cause may be afterwards brought; to prevent the vexation of which this statute was passed.

BUT the Court said, that the case of a *noli prosequi* could not be distinguished in reason from that of a discontinuance; for that in this, as well as in that, the party might afterwards commence another action for the same cause; and that the

practice had been to give costs in such cases. Rule absolute (1).

SECT. III.

Of Costs where there are several Defendants, and one or more of them acquitted by Verdict.

Where there are several defendants, in trespass, &c. and one or more of them acquitted by verdict, he or they so acquitted shall have costs.

By the 8 and 9 *W.* 3. c. 11. s. 1. it is enacted,—"That "where several persons shall be made defendants to any "action or plaint of trespass, assault, false imprisonment, or "*ejectione firmæ*, and any one or more of them shall be upon "the trial thereof acquitted by verdict, every person or per- "sons so acquitted shall recover his costs of suit, in like man- "ner as if a verdict had been given against the plaintiff, and "acquitted all the defendants; unless the judge before whom "such cause shall be tried, shall, immediately after the trial "thereof, in open court, certify upon the record, under his "hand, that there was a reasonable cause for the making such "person or persons a defendant or defendants to such action "or plaint."

(1) The only case, in which this question appears to have undergone any discussion in the courts, is that of *Turner* v. *Gallilee*, *Hard.* 152. mentioned by the plaintiff's counsel in *Cooper* v. *Tiffin*; in that case, after issue joined and notice given by the defendant of trial by *proviso*, the plaintiff in person entered a *noli prosequi*, upon which the defendant moved for costs; but the decision of the Court in that case is no where to be found, the report in *Hardres*, containing nothing more than his own arguments for the plaintiff, in the course of which, he urged the distinction taken by the counsel in *Cooper* v. *Tiffin* between a *noli prosequi* and a discontinuance or nonsuit, the former of which, he contended, was equal to a *retraxit*.

BEFORE this statute a plaintiff was not liable to the payment of any costs to a defendant who was acquitted, provided he obtained a verdict against any one of the defendants in the action; the courts construing the former acts, by which costs are given to defendants, only to extend to the case of a total acquittal of *all* the defendants in a suit. This construction was, sometimes, productive of great injustice; for it afforded a plaintiff an opportunity, by making an amicable defendant (who by collusion was to make no defence, but suffer judgment to go against him by default), to evade the payment of costs to the only real defendants in the action, in case they should have a verdict in their favour. But although it is consistent with natural justice, that a defendant should have costs in *every* case where he has obtained a verdict, and been unnecessarily joined in the action, notwithstanding the plaintiff may have succeeded against other defendants in the same cause, yet there are many species of actions, at this day, where a defendant so circumstanced cannot have costs; for the decisions on the statute of *William* the Third, have restricted it's operation to actions of trespass *vi et armis*.

2 Str. 1005. Sed vide Moore, 770. Noy, 101.

Vide Comb. 364.

AN action of trespass *upon the case*, has been held not to be comprehended within the 8 and 9 *W.* 3. c. 11. s. 1.

THUS, in an action upon the case for a nuisance against two defendants, against one of whom there was judgment by default, and, at the trial, a verdict *for* the other, it was held, after consideration, that the acquitted defendant was not entitled to any costs. And Lord HARDWICKE, *Chief Justice*,

Dibben v. Cooke, B. R. H. 8 G. 2. 2 Str. 1005.

in delivering the resolution of the Court, said, that, as it was settled that all statutes relating to costs are and ought to be construed *strictly* and according to the letter, the word "*trespass*" used in the 8 and 9 *W.* 3. must be taken only to mean the general sort of trespass *vi et armis*, and not trespass *upon the case*. And he added, that upon inquiry into the practice of the *Common Pleas*, it appeared that the word trespass was there taken only to relate to trespasses *vi et armis*.

3 Burr. 1287.

NEITHER is *replevin* an action or plaint within that statute.

Ingle v. Wordsworth and another, B. R. H. 2 G. 3. 3 Burr. 1284. S. C. 1 Blackst. 355.

THUS where, in an action of *replevin*, one defendant was found guilty, and the other acquitted by verdict, the question was, whether the latter could have his costs under the 8 and 9 *W.* 3. c. 11. s. 1, the judge, who tried the cause, not having certified that there was a reasonable cause for making him a defendant?

LORD MANSFIELD,—We have thought of this case. We had a strong bias to have given the defendant his costs, if it had been possible; because it is agreeable to natural justice, that he should receive them, if there was no reasonable cause for making him a defendant.

BUT the matter is *too fully settled* to be *now* gone into, upon reasons at large.

THE statute speaks generally of actions of *trespass*, and

does not particularly specify any actions of trespass that are not trespasses *quare vi et armis*. But this is a case of *replevin*, which cannot have that latitude of construction put upon it, which has been contended for, consistent with the settled cases.

It has been so settled and established, that *this* act, and all acts that give costs, are to be construed strictly. In *Dibben* v. *Cooke* it was held that an action of trespass *on the case* is not within the statute; and trespass *upon the case* is nearer to trespass *vi et armis*, than *replevin* is; which differs in many things from a mere action of trespass.

The argument in the case of *Dibben* v. *Cooke* was, that actions of trespass upon the case have been holden to be within the proviso of the statute of limitations, though as much excluded there as here, by so many *other* actions being *specified* in that clause (*a*), and *this* omitted.

(*a*) 21 Jac. 1. c. 16. s. 7.

But that proviso is to be construed *liberally*; this statute *strictly*. I consider this point so fully settled, as not to be got over, upon any reasoning at large. Therefore the rule for taxing costs for the defendant must be discharged.

And, in conformity to the above resolutions, it hath been determined that an action of *trover* is not an action of trespass within the statute of 8 and 9 *W.* 3, and consequently if, in trover against several defendants, one be found guilty, and the others acquitted, the latter are not entitled to any costs.

Poole v. Boulton and others, Barnes, 139. Marriner v. Barret, cited 3 Burr. 1285.

The Queen v. Danvers and others, Salk. 194.

So if one defendant be acquitted at the assizes, upon an information against several, he cannot have costs under the 8 and 9 *W.* 3. c. 11. s. 1.

Thrustout on Dem. of Jenkinson v. Woodyear and others, H. 10 G. 2. Barnes, 131.

Upon the trial, in an action of ejectment, all the defendants were found guilty except one who was acquitted; after this defendant had got his costs taxed upon the *postea* (the judge not having certified that there was a reasonable cause for joining him in the action), he applied to the Court that he might be not only allowed a third part of a defendant's common costs, but also all his extraordinary costs; but it appearing to be nothing more than a contrivance to fix the plaintiff with the extraordinary costs, which had been incurred on account of all the defendants, to one of whom the acquitted defendant was tenant, and indemnified by him, the Court discharged the rule with costs.

Mordecai v. Nutting and others, M. 23 G. 2. Barnes, 145.

In trespass *vi et armis* there was a verdict for the plaintiff against one defendant, and against the plaintiff as to the other defendants; upon an affidavit that the plaintiff was an indigent and itinerant Jew, the defendants, who were acquitted, moved that the costs, to which they were entitled, might be deducted out of what should be allowed by the prothonotary to the plaintiff against the other defendant, but the Court denied the motion, declaring it to be unprecedented.

But, in one case, where some of the defendants suffered judgment to go by default, and others went to trial and obtained a verdict, the Court permitted the costs and damages

on the judgment by default to be deducted from the costs taxed for the defendants, who had a verdict.

THUS in an action of trespass for breaking and entering the plaintiff's house, two of the defendants suffered judgment to go by default, and the third went on to trial, and obtained a verdict. Damages being assessed against the two former defendants at one halfpenny each, a rule was obtained to shew cause why the *costs*, which might be taxed against those defendants on the judgment by default, should not be deducted out of the costs taxed to the defendant, who had a verdict, on the *postea*, and allowed to the plaintiff, and in the mean time execution against them be stayed.

Schoole v. Noble and two others, C. B. T. 28 G. 3. H. Blackst. 23.

THIS was moved on an affidavit stating, that the two defendants had acted under the authority of him for whom the verdict was given, who had also undertaken to pay the damages and costs.

THE rule was opposed, on the ground that it went to deprive the attorney of that lien on the costs to which he was legally entitled.

BUT the Court held that the attorney could only have such a lien on the costs as was subject to the equitable claims of the parties in the cause, and therefore made the rule absolute.

SECT. IV.

Of Costs where there is judgment for the Defendant upon a Demurrer.

If, upon any demurrer, judgment be given against the plaintiff or demandant, the defendant or tenant to have costs.

THE statute of 8 and 9 *W.* 3. c. 11. s. 2. after reciting that "forasmuch as for want of a sufficient provision by law for "the payment of costs of suit, divers evil disposed persons "are encouraged to bring frivolous and vexatious actions;" enacts,—"that if any person shall commence, or prosecute "in any court of record, any action, plaint, or suit, wherein "upon any demurrer, either by the plaintiff or defendant, "demandant or tenant, judgment shall be given by the "Court against such plaintiff or demandant, the defendant "or tenant shall have judgment to recover his costs, and "have execution for the same by *capias ad satisfaciendum*, "*fieri facias*, or *elegit*."

Anon. H. 36 Eliz. 1 Anders. 117. pl. 163. March 30, Semb. S. P. upon 4 *Jac.* 1. c. 3. Sed vide contra Hard. 153 arg. Jenk. 161. Cro. Car. 533.

IT is laid down in one book, that if, on a demurrer to the *action*, there were judgment against the plaintiff, the defendant should have costs under the 23 *H.* 8. c. 15, though a case not expressly within the words of that statute, and that it had been often so adjudged, but that it was otherwise where the demurrer was only to the *writ*. But if a defendant had been entitled to costs in the case above mentioned, either by the 23 *H.* 8. c. 15, or the 4 *Jac.* 1. c. 3, it was unnecessary to make any provision for such costs by the 8 and 9 *W.* 3. —The statutes of 23 *H.* 8. and 4 *Jac.* 1. entitle a defendant to

costs only where the plaintiff is *nonsuited*, or a *verdict* passes against him, under which words it would be difficult to maintain that the legislature meant to include *a judgment upon demurrer*, particularly when it is recollected, that it is a well established principle that statutes relating to costs are to be construed *strictly*.

THE demurrer meant by the 8 and 9 *W.* 3. c. 11. s. 2. is a demurrer to the *merits*, upon which the court may decide the right of action, and give final judgment; therefore a defendant is not entitled to costs under this statute upon a judgment in his favour on a demurrer to a plea in abatement, because the judgment in such case is not final, nor the right of action thereby determined; and moreover, it was the intention of the act to give costs to a defendant only where the plaintiff would have been entitled to them, in case judgment had been given for him on the demurrer, and, upon a judgment in his favour upon a demurrer to a plea in abatement, the plaintiff has no costs.

THUS, in an action of *assumpsit*, the defendant pleaded his privilege as an officer of the Exchequer, in abatement, on which, the plea being held good upon demurrer thereto by the plaintiff, there was judgment *quod billa cassetur*. Afterwards the defendant moved for costs upon the 8 and 9 *W.* 3. c. 11; but by the Court, this is not a case within that statute. The act only extends to demurrers in bar, and not in abatement, because it speaks of suits which are vexatious, and it is impossible for the Court to say upon a demurrer to a plea in abatement, where the merits of the case

Thomas v. Lloyd, B. R. P. 10 W. 3. Salk. 194. S. C. 1 Ld. Raym. 336. Comb. 482. 12 Mod. 195. S. P. Garland v. Extend, B. R. M. 2 Ann. Salk. 194. S. C. 2 Ld. Raym. 992. 6 Mod. 88. Acc. 12 Mod. 523. 609. Gilb. H. C. P. 268. Cas. Pr. C. P. 36.

are not disclosed, whether or not the action is either frivolous or vexatious. And it would be unjust to give the defendant costs in this case, because if the demurrer had been adjudged for the plaintiff, he would not have had costs against the defendant, but only judgment *quod respondeat ouster*, and the right to costs, in such a case, ought to be mutual and reciprocal.

NEITHER is a defendant entitled to costs under the 8 and 9 *W.* 3. c. 11. on a judgment in his favour upon demurrer in a species of action, where the plaintiff would not have had costs if *he* had obtained judgment; for costs given by that statute, are confined to cases, where the right is mutual and reciprocal between the plaintiff and defendant.

Miller v. Seagrave, H. 10 G. 1. Cas. Pr. C. P. 25.

THUS, where judgment was given for the tenant on demurrer in *formedon* in remainder, it was insisted on the part of the demandant that there should be no costs, because if the demandant had recovered, he could not have had costs, no damages being recoverable in a formedon at common law. And, it was said, though the words of the statute of *William* the Third are general, yet the intent thereof was only to extend a defendant's right to costs on judgment on demurrer in such actions and cases where, by preceding statutes, he would have been entitled to costs in the case of a nonsuit, or verdict against the plaintiff.

KING, *Chief Justice*, and DORMER and DENTON, *Justices*, thought that the tenant should have no costs; but, TRACEY, *Justice*, inclining to a contrary opinion, the

point was adjourned, and afterwards was solemnly argued a second time, when the Court threw out a strong opinion against the tenant's right to costs, and, after taking further time to consider, finally resolved that *no costs* should be allowed.

Anon. T. 11 Ann. Cas. Pr. C. P. 4.

INDEED it has been holden in one case, that a defendant shall have costs on a judgment in his favour upon a demurrer in *quare impedit*, which is contrary to the above determination in *formedon*, because no costs are recoverable by the plaintiff in a *quare impedit*; but, besides that this case was prior in point of time to the decision in *Miller* v. *Seagrave*, and does not appear to have undergone either much argument or consideration, it has been expressly overruled by a recent and solemn decision of the Court of *Common Pleas*, wherein, after taking the statute of 8 and 9 *W.* 3. c. 11. s. 2. and the cases that have been adjudged thereon, into full consideration, that court unanimously held, that a defendant, obtaining judgment on demurrer in *quare impedit*, is *not* entitled to costs. And Lord LOUGHBOROUGH, in delivering the opinion of the Court, expressly recognized the principle on which the resolution in *Miller* v. *Seagrave*, is grounded, namely, that the costs given by the 8 and 9 *W.* 3. are confined to cases where the plaintiff as well as the defendant is entitled to them.

Thrale and others v. the Bishop of London, and others C. B. M. 31 G. 3. H. Blackst. 530.

IN an action of trespass and assault for criminal conversation with the plaintiff's wife, the defendant, by leave of the Court, under the statute of 4 *Anne*, c. 16, pleaded two pleas, not guilty, and not guilty *infra sex annos*. On the former

Cooke v. Sayer, B. R. H. 32 G. 2. 2 Burr. 763. S. C. 2 Wils. 85.

plea issue was joined, and to the latter, the plaintiff put in a demurrer. Previous to the arguing of the demurrer, the issue, joined on the first plea, was tried by the country, when a verdict was found thereon for the plaintiff, with 50*l.* damages, and afterwards the demurrer was argued and adjudged for the defendant. Under these circumstances, it was holden, that the defendant should have judgment, and also the *costs* of the *demurrer*, but that, upon the trial, there should be *no costs on either side*.

BUT a defendant is not entitled to costs, although a demurrer to a plea be adjudged for him, unless the plea be an answer to the *whole* declaration.

Astley v. Young, B. R. T. 1 G. 3. 2 Burr. 1232.

THUS, where the declaration consisted of two counts, and there was a joinder in demurrer on a plea to one of the counts, and issue joined on a plea to the other, and judgment for the defendant on the demurrer, and a verdict for the plaintiff on the trial of the issue to the country; it was resolved by the Court, that the defendant could have *no costs* upon his judgment on the demurrer. But where there is *double* pleading, and *each* plea goes to the *whole declaration*; and there is a demurrer to any one such plea, and judgment for the defendant thereupon, there the defendant should have costs, for the plaintiff should not try his issue, after the defendant has had judgment upon a demurrer which goes to the whole.

Yates v. Gun, M. 25 G. 2. Barnes, 141.

INDEED, in one case, where there was an issue joined and likewise a joinder in demurrer, and a verdict for the plaintiff on the trial of the issue, and judgment for the defendant on

the demurrer, which was argued subsequent to the trial; the Court of Common Pleas ordered the prothonotary to tax the costs of the trial for the plaintiff, and those of the demurrer for the defendant, and that the smaller sum on such taxation should be deducted from the greater.

But the note of this case in *Barnes* is so extremely short and obscure, as to leave us ignorant of the principles upon which the Court acted in making the decision; at any rate, being prior in point of time to the determinations in *Cooke* v. *Sayer*, and *Astley* v. *Young*, it can be of no weight or authority in cases circumstanced like either of those.

SECT. V.

Of the Costs of a Defendant, where he is impleaded in a Superior Court, for a Matter within the Jurisdiction of a Court of Conscience, or Requests.

The statute 3 *Jac.* 1. c. 15. s. 2. (1) (entitled an act for the recovering of small debts, and for the relieving of poor debtors in *London*), enacts, "that every citizen and free-" man of the city of *London*, and every other person inhabit-" ing or that shall inhabit within the said city, or the liberties

(1) The first of these courts of summary jurisdiction, called Courts of Requests, or Courts of Conscience, for the recovery of small debts, was established in *London* in the reign of *Henry* the Eighth, by an act of their common council; which, however, was certainly insufficient for the purpose intended, and illegal, till it received the sanction of the legislature by this statute of *James* 1. 3 Bl. Com. 81. Doug. 244. *n.* [1].

" thereof, being a tradesman, victualler, or a labouring man,
" which now, or hereafter, shall have any debt owing unto
" him, not amounting to forty shillings, by any citizen, or
" by any other person being a victualler, tradesman, or la-
" bouring man, inhabiting within the said city, or the liber-
" ties thereof,"—may summon such debtor to the Court of Requests or Conscience, in *London*; which court shall have power to determine such causes.

3 *Jac.* 1. c. 15. s. 4. " That if in any action of debt, or
" action upon the case upon an *assumpsit* for the recovery
" of any debt, to be sued or prosecuted against any the per-
" son or persons aforesaid, in any of the King's courts at
" *Westminster*, or elsewhere out of the said Court of Requests
" in the city of *London*, commonly called the Court of Con-
" science, it shall appear to the judge or judges of the court,
" where such action shall be sued or prosecuted, that the
" debt to be recovered by the plaintiff in such action doth
" not amount to the sum of forty shillings, and the defendant
" in such action shall duly prove, either by sufficient testi-
" mony, or by his own oath, to be allowed by any the judge
" or judges of the said court, where such action shall depend,
" that at the time of the commencing such action, such de-
" fendant was inhabiting and resiant in the city of *London*
" or the liberties thereof, as above, that in such case, the said
" judge or judges shall not allow to the said plaintiff any costs
" of suit, but shall award that the plaintiff shall pay so much
" ordinary costs to the defendant, as the defendant shall
" prove before the said judge or judges, it hath truly cost
" him in the defence of the said suit."

3 *Jac.* 1. c. 15. s. 6. "Provided that this act shall not "extend to any debt for any rent upon any lease of land or "tenements, or any other real contracts, nor to any other debt "that shall arise by reason of any cause concerning a testa- "ment or matrimony, or any thing concerning, or properly "belonging to, the Ecclesiastical Court, albeit the same shall "be under forty shillings."

The right of suing in this court is, by statute 14 *G.* 2. c. 10. s. 1. (by which that of *Jac.* 1. is explained and confirmed) extended to every citizen and freeman of *London*, and every other person inhabiting within the city, or it's liberties,—and every person renting or keeping any shop, shed, stall, or stand, or seeking a livelihood in the city, or it's liberties, *against* any person whatsoever inhabiting or seeking a livelihood within the same limits, whilst so inhabiting or seeking a livelihood."

THE time and expence of obtaining this summary redress being very inconsiderable, and, consequently, a great benefit to trade, since the reign of *James* the First, Courts of Conscience have been established, by a variety of acts of parliament (1), in many trading towns and other districts; but it will be unnecessary to go into a detail of those statutes, as most of them contain nearly the same provisions and regulations with those of the statute of *Jac.* 1. already noticed with respect to the Court of Conscience of *London*. It may,

(1) By 27 *G.* 2. c. 16. s. 2. all acts of parliament for erecting Courts of Requests or Conscience, for recovering small debts, in cities, towns corporate and other places, are made public acts.

therefore, suffice to take a cursory view of such only of those acts of parliament, as have given rise to any judicial determinations, and to remark the points in which *they* correspond with, or vary from, the statute of *James* the First.

THE statute 23 *G.* 2. c. 30, by which a Court of Requests was constituted for the *Tower* Hamlets, contains no restriction as to the party suing, and renders any person liable to be sued, who resides, inhabits, or keeps any shop, shed, stall, or stand, seeks a livelihood, trades, or deals within the district therein described. In this act of parliament are two clauses similar to the fourth and sixth of 3 *Jac.* 1,—entitling a defendant to costs when sued in another court, for a matter belonging to the jurisdiction of the court of the *Tower* Hamlets, and excepting certain debts and causes out of the statute. The 8th section provides that, if the judge, who tried the cause, shall certify that the plaintiff had a probable cause of action for forty shillings or more, the plaintiff shall not pay but recover costs, although he may have obtained a verdict for less than forty shillings in one of the courts at *Westminster*, great session of *Wales*, or counties palatine. And the 21st section enacts, that no action or suit, for any debt under forty shillings, and recoverable by virtue of that act, in the said Court of Requests, shall be brought in any other court whatsoever.

BY 23 *G.* 2. c. 33. it is enacted, that a special county court shall be held, at least once a month, in every hundred of the county of *Middlesex* by the county clerk. That in all causes, not exceeding the value of forty shillings, the county

clerk and twelve suitors of the said county court, shall proceed in a summary way, and from time to time make such order or decree therein, as they shall judge agreeable to equity and good conscience. "That in case any action of debt, or "action upon *assumpsit*, shall be commenced and prosecuted "in any of his majesty's courts of record at *Westminster*, "and the defendant, at the time of such action brought, "shall *live or reside* in the said county of *Middlesex*, and "*be liable to be summoned to the said county court*, and the "jury, upon the trial of such cause, shall find the damages "for the plaintiff under forty shillings, unless the judge shall, "in open court, certify upon the back of the record, that the "freehold, or title to the plaintiff's land, principally came in "question, at such trial,—no costs shall be awarded to the "plaintiff in such action, but the defendant shall be entitled "to, and recover double costs of suit (*a*)." And by the fourth clause of this statute, no person is liable to be summoned to the county court, as new modelled, who was not so to the old common law county court; and the new court can hold plea of no action, cause, or suit, except such as the old county court might, formerly, have held plea of by plaint.

(*a*) s. 19.

If a man be sued in one of the superior courts for a matter arising within the jurisdiction of the Court of Conscience of *London*, he may plead the statute of 3 *Jac.* 1. c. 15. in bar of the action; and should he omit to take advantage of the statute in that stage of the cause, and suffer *a verdict* to go against him, if the damages thereby given are under forty shillings, the Court will permit him to receive the benefit of the statute by entering a suggestion upon the roll.

Pennel v. Wallis, B. R. M. 9 W. 3. cited Str. 47.

Hickman v. Colley, B. R. M. 13 G. 2. 2 Str. 1120. S.C. Andr. 377.

AND in such case, the defendant is not only entitled to the costs of the trial and former proceedings, but also to those occasioned by the application to the Court for leave to enter the suggestion upon the record.

Brampton v. Crabb, B. R. H. 3 G. 1. 1 Str. 46.

BUT if the defendant, in an action, which ought, by the statute of *James* the First, to have been sued in the *London* Court of Conscience, suffer judgment to go by *default*, he cannot afterwards enter a suggestion upon the roll in order to entitle him to costs, however small the damages may be; —because when an inquest is taken by default, the defendant is out of court to all purposes, but having judgment against him (1).

1 Wils. 20. *marg.*

ALTHOUGH the plaintiff should *declare* for *more than forty shillings*, yet if he obtain a *verdict* for less than that sum, the real debt or demand, at the commencement of the action, the defendant will be entitled to enter a suggestion on the roll for costs.

(1) In *Brampton* v. *Crabb* the suggestion was, "*quod querens nulla "misas et custagia versus ipsum in "hoc casu super veredictum illud re- "cuperare debet, sed humillime petit "idem defendens quod misæ et custagia "sua per ipsum circa defensionem suam "in hac parte expensa per judicium "hujus curiæ juxta formam statuti "sibi adjudicentur, quia dicit quod.*" (setting out the act of 3 *Jac.* 1. c. 15.) Then the defendant avers, that at the time of making the promises in the declaration, *et semper abinde hucusque*, he was and is a freeman of the city of *London*, resident therein, (*viz.* in such a parish and ward) using the trade of a cooper, and that the plaintiff was and is a freeman, residing within the city, *viz.* &c. using the trade of a barber, and that the cause of action arose within the jurisdiction of the Court of Conscience, which was held every *Wednesday* and *Saturday* in every week since the time of making the promise. He likewise averred, that he was indebted to the plaintiff in no more than 22 *s.* and that he had expended so much in his defence, which the plaintiff ought to pay, *juxta formam statuti præd.*

THUS, upon a rule to shew cause why a suggestion should not be entered upon the record, in order to entitle the defendant to his costs under the statute 22 *G.* 2. c. 47. (*a*) for erecting a Court of Requests for the Borough of *Southwark*, the question was whether, as the plaintiff had alleged in his declaration, that the sum due to him from the defendant exceeded forty shillings, and had obtained a *verdict* for only thirty shillings, he was liable to pay the defendant costs, he being a person liable to be sued in the Borough Court of Requests?

Weston v. Donelly, B. R. P. 29 G. 2. Say. 273.

(*a*) The provisions in 22 G. 2. c. 47, are, with respect to costs, similar to those of the 3 *Jac.* 1. c. 15.

AND by RYDER, *Chief Justice*.—We are of opinion, that, as the plaintiff did not obtain a verdict for forty shillings, he is liable to costs. In the 3 *Jac.* 1. c. 15. the words are, *the debt to be recovered*; yet the construction has always been, that if the defendant be resiant within the city of *London*, the plaintiff, in case he bring an action in one of the superior courts, is liable to costs, unless he obtain a verdict for forty shillings.

IF, however, the plaintiff's demand, at the commencement of the action exceeded forty shillings, and the defendant either plead, or give in evidence a *set off*, which reduces the balance due to the plaintiff, under that sum, the defendant, though within the jurisdiction of a Court of Conscience, is not entitled to costs.

THUS where, the defendant having pleaded a set off, the plaintiff, at the trial, proved there was due to him from defendant 4*l.* 15*s.* 3*d.* and the defendant proved that the

Pitts v. Carpenter, B. R. T. 16 G. 2. 2 Str. 1191. S. C. 1 Wils. 19. S. P. Gross v. Fisher, C. B.

H. 10 G. 3. 3 Wils. 48. S.C. Say. Costs 65.

plaintiff owed him 3 *l.* 2 *s.* whereby the balance was reduced to 1 *l.* 13 *s.* 3 *d.* for which sum the plaintiff obtained a verdict. Upon which it was moved on the part of the defendant, that he might be at liberty, in order to get his costs under 3 *Jac.* 1. c. 15. to suggest upon the roll, that he and the plaintiff were both citizens of *London*, and that the debt recovered was under forty shillings.

But the Court rejected the motion, and held, that the defendant was not entitled to the benefit of that act, though the damages were under forty shillings, because the plaintiff's real demand was above that sum, and it was impossible for him to know that the defendant intended to plead a set off; and if the plaintiff had gone to the Court of Conscience for this demand, and the defendant had thought fit not to have proved any set off, it is evident that Court would have had no jurisdiction. Besides, the plaintiff has in effect recovered 4 *l.* 15 *s.* 3 *d.* because a debt, which he must otherwise have paid, is now satisfied. Here are two causes of action determined, both of them of greater value than is within the inferior jurisdiction.

Heaward v. Hopkins, B.R. M. 21 G. 3. Doug. 448.

So, if there is a plea of *tender* as to part of the demand, and *non assumpsit* as to the residue, and, the issue joined on the plea of tender being found for the defendant, the balance proved under the *non assumpsit* does not amount to forty shillings; yet, if that together with the sum tendered exceed forty shillings, the defendant, though resident within the jurisdiction of the county court of *Middlesex*, is not entitled to double costs under statute 23 *G.* 2. c. 33. s. 19. The plain-

tiff could not know that the defendant would plead a tender. The reason of the determination in the case of *Pitts* v. *Carpenter*, is equally applicable here. The tender was not an extinguishment of the debt, and the question is, what appears to have been due at the time of the action brought? for if that exceed forty shillings, the inferior court has no jurisdiction.

Benson v. Hemming, T. 18 and 19 G. 2. Barnes, 353.

But it is otherwise where the plaintiff's demand, originally above forty shillings, is reduced by *payments* in part, prior to the bringing the action, to less than forty shillings. For this is different from the case, where mutual debts subsist at the commencement of the action. Here no set off is used or necessary, for the part which is paid by the defendant to the plaintiff, is not a debt owing by the plaintiff to the defendant, but operates as a discharge of the plaintiff's demand *pro tanto*, and may be given in evidence, under *non assumpsit*. Therefore in a case so circumstanced, the defendant, if a person within the jurisdiction of a Court of Request or Conscience, is entitled to enter a suggestion upon the roll, in order to recover his costs under the statute erecting such inferior court.

If the jury find a verdict with less than forty shillings damages, in an action which ought to have been prosecuted in a Court of Conscience, the Court are bound to allow the defendant to enter a suggestion upon the record to entitle himself to the benefit of the statute constituting such Court of Conscience.

Fitzpatrick v. Pickering, C. B. P. 30 G. 2.

Thus, where the plaintiff in an action upon the case for

2 Wils. 68. S. C. Barnes, 470. but differently reported.

use and occupation for above forty shillings, and upon several other counts, failed, at the trial, by reason of the absence of a witness, in proving the use and occupation, but obtained a verdict for twenty-eight shillings upon another count; in consequence of which the defendant moved for leave to enter upon the roll by way of suggestion, that he resided in *Middlesex*, and that the debt was under forty shillings. For the plaintiff it was said, that this was an extremely hard case, as he had not succeeded to prove his demand above forty shillings, merely from an accident, the non-attendance of his witnesses, and that the Court had a discretion either to grant or refuse the suggestion prayed for by the defendant.

But by the Court,—We are bound by the act of parliament to give the defendant leave to enter the suggestion prayed, and the plaintiff may traverse it if he pleases; and it is not in our discretion whether we will grant it or not. By the verdict, here, we must take it that there was no more money originally due to the plaintiff than twenty-eight shillings, and, therefore, the *postea* must be delivered to the defendant, with leave to enter the suggestion prayed.

Butler v. Grubb, B. R. H. 23 G. 3. Imp. Pr. K. B. 3 Ed. 560.

If at the trial of an action of *assumpsit*, the parties agree to refer the matter to arbitration, and the arbitrator award only 1 *l.* 17 *s.* to be due to the plaintiff at the commencement of the action; the defendant, both he and the plaintiff living within the jurisdiction of a Court of Conscience, is entitled to enter a suggestion upon the roll in order to have his costs.

An action for use and occupation cannot be maintained

in the Court of Conscience in *London*; and, therefore, in such an action, brought in the Court of *King's Bench*, the defendant, though a person within the jurisdiction of the city Court of Conscience, and the damages under forty shillings, is not entitled to costs under the statute 3 *Jac.* 1. c. 15.

THUS, after a verdict for the plaintiff in an action for use and occupation, the damages being only 1 *l.* 7 *s.* 6 *d.* a rule was obtained to shew cause, why the defendant should not have leave to suggest on the roll, that the damages recovered were under forty shillings, and that the defendant, at the time the action was brought, was an inhabitant, &c. in *London*, and liable to be sued in the Court of Conscience there, under 3 *Jac.* 1. Woolley v. Cloutman, B. R. M. 20 G. 3 Doug. 244.

ON shewing cause, it was insisted, that this was a case within the exception in the sixth clause of the statute, the words of which are not "*any action of debt for rent*,"— but "*any debt for rent*;" and therefore the substance, not the form of the action was what the legislature had in view, the intention being to prevent questions of title from coming before this inferior jurisdiction.

AND a similar case was mentioned, which had been before the Court some time ago, on the statute erecting the Court of Requests in the *Tower* Hamlets (*a*), in which there is an exception (*b*) in the very same words with that in the act of *James* 1.

(*a*) 23 G. 2. c. 30.
(*b*) s. 20.

IN support of the rule it was stated, that such actions had

been usually brought in the Court of Conscience, and it was contended, that, by "*other real contracts*," was meant, covenants for rent by deed, and that the exception only extended to actions for rent upon specialties.

LORD MANSFIELD.—It may have been usual to bring such actions in the City court; if the defendant makes no objection, the cause proceeds of course; but there is no instance where the point has been litigated and the jurisdiction allowed. The title may come in question in this sort of action; if brought, for instance, by a devisee or a purchaser. We think this case within the exception; and, in the case alluded to at the bar, we had all formed the same opinion; but it was compromised.

BULLER, *Justice*, said, the construction put upon the words "*other real contracts*," was very improbable, because, at the time of making the act, it was not necessary that leases should be in writing, much less by deed, which even yet is not required. That, before this action for use and occupation came to be used, after 11 *G.* 2. c. 19. s. 14, it was common to bring debt for rent on parole leases. The rule discharged (1).

(1) It is remarked by Mr. Douglas, that the affidavit, on which the motion was grounded in *Woolley* v. *Cloutman*, stated only the *defendant*'s resiancy within the city of *London*, and that the rule did not go to the suggestion on the roll of any thing touching the *plaintiff*'s description, or where he inhabited; but he thinks that the 2d and 4th clauses of the act of *Jac.* 1. ought to be taken together, and that the defendant ought to shew that the plaintiff was such a person as is authorized by s. 2. to sue in the city Court. And so, he says, it seems to have been understood in *Hickman* v. *Colley*; and in *Brampton* v.

NEITHER *personal representatives*, nor *attornies* are liable to be sued in the county court of *Middlesex*, and, therefore, when sued in the superior courts, though inhabitants of *Middlesex*, and the damages under forty shillings, they are excluded the benefit of statute 23 *G.* 2. c. 33. s. 19.

THUS, in an action brought against an executor upon an apothecary's bill, owing by the defendant's testator, the plaintiff had a verdict for 1 *l.* 5 *s.* Upon which the defendant obtained a rule to shew cause, why he should not have leave to suggest on the roll that he lived in *Middlesex*, and that the debt was under forty shillings. Afterwards, in support of the rule, it was said, that in the establishment of several courts of this sort, there is an express exception relative to testamentary questions (*a*), and as there is none in the act of 23 *G.* 2. c. 33. it was a fair inference, that no such exception was meant. At any rate, the Court would allow the suggestion of the fact, leaving the consequence in point of law for subsequent consideration.

Ailway v. Burrows, *Exor.* B.R.M. 20 G. 3. Doug. 263.

(*a*) Vide 3 Jac. 1. c. 15. s. 6. and 23 G. 2. c. 30. s. 20. supra. 155.

LORD MANSFIELD.—The Court will not permit the suggestion of a matter on the roll, unless it appear to be relevant, and it could not be meant to give this Court of Conscience a jurisdiction over executors. If there is no express exception, there is one implied from the nature and reason of the thing. The rule discharged.

AGAIN, in *assumpsit* there was a verdict for the plaintiff

Wiltshire v. Lloyd, B.R.P. 20 G. 3. Doug. 381.

Crab, and *Pitts* v. *Carpenter*, *supra*, the suggestion stated both the plaintiff and defendant to be citizens of *London*. *Doug*. 245. n. [2].

with only seventeen shillings damages; after which, the defendant, who was an attorney, obtained a rule to shew cause why it should not be suggested on the roll, that he was an inhabitant of *Middlesex*, at the time the action was brought, and liable to be summoned to the County Court, in order to entitle himself to double costs under 23 *G.* 2. c. 33. s. 19.

Among other arguments against the rule it was urged, that the act establishing the summary jurisdiction of the *Middlesex* County Court, could never mean to affect the privilege of an attorney to be sued in his own court. That this was manifest from the act constituting the *Westminster* Court of Conscience (*b*), for it being deemed expedient that attornies and solicitors should be liable to be sued in that Court, a particular statute subsequent to the act erecting the Court (*c*), was necessary to extend the jurisdiction to them. And, besides, that the question had been already solemnly decided, by the Court of *Common Pleas*, in the case of *Gardner* v. *Jessop* (1).

(*b*) 23 G. 2. c. 27.

(*c*) 24 G. 2. c. 42.

On the other side, a subsequent case, in the Court of *King's Bench*, viz. *Silk* v. *Bennet*, M. 5 *G.* 3. 3 *Burr.* 1583. was relied on, where the Court refused to grant an attach-

(1) *H.* 30 *G.* 2. 2 *Wils.* 42. That case was *assumpsit* for goods sold and delivered; to which the defendant pleaded *non assumpsit* as to all except 1 *l.* 3 *s.* 8 *d.* and, as to that sum, that he ought not to be sued in the Court of *Common Pleas*, because he resided in *Middlesex*, and was liable to be summoned to the County Court there, within the meaning of 23 *G.* 2. c. 33; replication that the defendant, being an attorney, was not liable to be summoned to the said County Court; to this there was a demurrer, which, after joinder therein, and argument, was adjudged for the plaintiff.

ment against the commissioners of the *London* Court of Conscience, for having proceeded against an attorney after he had served them with a writ of privilege, holding that the City Court had a mixed jurisdiction, *equitable* as well as *legal*, and that privilege does not extend to courts of equity.

Lord Mansfield said, there seemed to be a contradiction between the two cases, and his lordship read the master's note of that of *Silk* v. *Bennet*, which agreed with Sir *James Burrow's* report.

The Court took time to consider, and then Lord Mansfield delivered their opinion, as follows;—We have spoken to the judges of the Court of *Common Pleas*, and find, that it was decided by the case in that Court, that an attorney is not liable to be sued in the *Middlesex* Court of Conscience. Therefore the suggestion cannot be allowed. The rule discharged.

And it hath likewise been determined, that, where the plaintiff is an attorney, the defendant is not entitled to the benefit of the statute 23 *G.* 2. c. 33. though resident within the jurisdiction of the County Court of *Middlesex*. Hussey and another v. Jordan, B. R. T. 25 G. 3. Doug. 382, n. [† 97]

But where the plaintiff brings an action of *assumpsit* as a personal representative, for instance as an *administrator*, in the Court of *King's Bench*, and recovers less than forty shillings damages, the defendant, if resident within the county of *Middlesex*, and liable to be summoned to the County Court, is entitled to have these circumstances suggested upon Wase, *administrator* v. Wyburd, B. R. M. 20 G. 3. Doug. 246.

the roll, in order to entitle himself to double costs under 23 G. 2. c. 33. in the same manner as if the plaintiff had sued in his own right.

(a) Explained and amended by 24 G. 2. c. 42.

THE statute 23 G. 2. c. 27. (a) established a Court of Requests for the city and liberty of *Westminster*, and that part of the Duchy of *Lancaster* adjoining thereto. And this act contains regulations with respect to the persons authorized to sue or liable to be sued, similar to those in the statutes already noticed, and likewise an exception of actions of debt for rent, and testamentary and matrimonial causes.

THE eighth clause of this statute enacts, that, if in any action of debt or *assumpsit* brought against any of the persons therein described, in any other court than the said Court of Requests, the plaintiff shall declare for a less sum than forty shillings, "the defendant *may plead* generally in bar "of such action, that, at the time such action was com- "menced, he was inhabitant and resiant within the said city "and liberty of *Westminster*, or that part of the Duchy "aforesaid, and was liable to be summoned to the said Court "of Requests; and in case the plaintiff, in any such action, "shall declare for the sum of forty shillings or upwards, the "defendant may plead generally (over and above such mat- "ters as aforesaid), that he was not, at the commencement "of such action, indebted to the plaintiff in any manner to "the amount of forty shillings, without pleading any other "matter specially, whereto the plaintiff shall or may reply "generally, and deny the matters pleaded; and if the plain- "tiff be nonsuited, discontinue his action, or verdict, or

"judgment on demurrer, pass or be given against him, the "defendant shall have full costs."

If a defendant, liable to be summoned to the Court of Requests for *Westminster*, be sued in one of the superior courts for a debt under forty shillings, he ought to *plead the* 23 *G.* 2. *c.* 27. *in bar* to the action, or at least make the objection at the trial of the cause, for *after verdict* he will not be permitted to take advantage of the act, either by a suggestion of the facts upon the roll, or otherwise, but the plaintiff, in such case, will be entitled to his costs, though the damages do not amount to forty shillings.

As where, the plaintiff having recovered twenty-eight shillings on the trial, the defendant, on the 23 *G.* 2. c. 27, obtained a rule to shew cause, why he should not be at liberty to enter a suggestion on the record, that, at the commencement of the action, he lived within the jurisdiction of the Court of Requests of *Westminster*; or why all further proceedings should not be stayed. Taylor v. Blair, B. R. M. 30 G. 3. 3 Term Rep. 452.

Against the rule, it was insisted that the application came too late after plea pleaded, because the only advantage to which a defendant in such a case was entitled, was to plead the matter in bar to the plaintiff's action, under the eighth section of the statute. Under the statute of *Gloucester* (6 *Ed.* 1. c. 1.) every plaintiff, who recovers damages at the trial, is entitled to costs, unless he be deprived of them by some subsequent act. Now this statute deprives the plaintiff of costs only where he takes issue on the matter

pleaded in bar, by virtue of the eighth section, and that is found against him; and if the application were to succeed, it would repeal this clause of the act.

On the other side it was observed, that this act of parliament differed from the 23 *G.* 2. c. 33. relative to the county court of *Middlesex*; for the twenty-first section of this act enacts,—"that no action for any debt under forty shillings, "and recoverable in the Court of Requests, *shall be* brought "against any person residing within it's jurisdiction, in any "other court whatsoever." The eighth section only says, that the defendant "*may*"—not "*shall* plead generally, &c." leaving it in his option to do so or not. He may therefore have the benefit of the statute either by pleading, by non-suiting the plaintiff at the trial, or by application to the Court at any time before judgment. A contrary construction would render the twenty-first section nugatory.

Lord Kenyon.—It has been urged in support of the rule that, unless we interfere in this stage of the proceedings, the twenty-first section of this act will be rendered nugatory: but that is by no means the case; for the defendant might have pleaded the statute; or, perhaps, if the objection had been made at the trial, the plaintiff would have been non-suited. The argument, that under the statute of *Gloucester* a plaintiff is entitled to costs, where he recovers damages, in all cases, unless deprived of them by some subsequent act, is unanswerable. Different acts of parliament have prescribed different modes by which a plaintiff may be deprived of costs; some by a suggestion on the roll; others by a certificate

from the judge; and others by plea. The statute in question has prescribed the latter mode; and as the defendant has not chosen to avail himself of that, his application is now too late.

Per Curiam. Rule discharged.

Anon. M. 9 W. 3. B. R. 5 Mod. 367.

If a private act of parliament direct that, where the damages, on a trial, between certain parties, in an inferior court, do not exceed forty shillings, "the plaintiff shall have "no judgment, but the defendant shall have costs," the judge of the inferior court ought (in a case within the statute), to direct the jury to find a *verdict for the defendant*; as he cannot, should they find for the plaintiff, though with under forty shillings damages, afterwards suggest the matter on the roll in order to have his costs.

CHAPTER III.

OF COSTS, IN ACTIONS PROSECUTED, OR DEFENDED, IN PARTICULAR RIGHTS, OR CAPACITIES.

SECT. I.

Of Costs, where a Person sues, or defends, as an Executor or Administrator.

SECT. II.

Where a Plaintiff sues upon a popular Statute, as a common Informer, or Prosecutor qui tam.

SECT. III.

Where a Plaintiff sues in Formâ Pauperis.

SECT. IV.

In Actions by, or against, Infants.

SECT. V.

In Actions against Justices of the Peace, &c. for something done by Virtue of their Offices.

SECT. VI.

In Actions concerning Seizures of Ships, &c. by Officers of the Customs, or Excise.

SECT. I.

Of Costs, where a Person sues, or defends, as an Executor or Administrator.

THE statutes of 23 *H.* 8. c. 15. and 4 *Jac.* 1. c. 3. whereby costs are given to a defendant in case the plaintiff be nonsuited, or a verdict pass against him, have been construed not to extend to give costs to a defendant in either of those cases, where the plaintiff in the action is, and sues as an executor or administrator. The reason of this construction, which is not warranted by any express exception, in either of the statutes abovementioned, in favour of executors or administrators, when plaintiffs, is, that those acts, being passed with a view to prevent, as much as possible, malicious and groundless suits, by subjecting plaintiffs, where they are nonsuited, or have a verdict against them, to the payment of costs, could not be intended to comprehend executors or administrators; because, suing *en autre droit*, and consequently, presumed to be unacquainted with the personal contracts, and rights of their testator or intestate, and, moreover, being only trustees for the creditors,—it cannot be supposed that they would institute a suit from malicious or vexatious motives, although such suit appears, ultimately, to be ill founded. Besides, an executor or administrator suing upon a specialty or contract made to or with his testator or intestate, is not liable to costs by the 23 *H.* 8. c. 15, though he should be nonsuited, or the defendant obtain a verdict, because that act only operates to

Cro. Eliz. 69. 503. Brownlow, 107. Yelv. 168. Cro. Jac. 229. 361. Hutt. 69. 79. 6 Mod. 93. Salk. 207. 1 Vent. 92. 2 Bulstr. 261. Litt. 5. Jenk. 161. pl. 7. 2 Keb. 679. 4 Mod. 245. 12 Mod. 440. 2 Kely. 70. Noy. 136. Gilb. H. C. P. 270. Cas. Pr. C. P. 15. 20. 157. Barnes, 127. 142. 1 Roll. Rep. 63. 2 Ro. Rep. 87. Dal. 96. Sav. 133. 2 P. Wms. 161. Andr. 358, 9.

Vide 2 Str. 1107. Andr. 358.

give costs to a defendant, in the two cases just mentioned, where the action is grounded upon a specialty or contract made to the *plaintiff or plaintiffs*, or between the *plaintiff or plaintiffs* and any other person; and the 4 *Jac.* 1. c. 3. only enlarges the actions, and not the persons.

1 Bac. Abr. 517, 518.

AND, upon the same principles, it should seem that an executor or administrator, when plaintiff, is not liable to costs, by the 8 and 9 *W.* 3. c. 11, on a judgment against him upon demurrer.

HOWEVER, the authorities, above cited, must be understood to exempt an executor or administrator, when plaintiff, from the payment of costs, in those cases only, where he cannot maintain the action otherwise than in his representative capacity, as when he sues upon a cause of action which arose antecedent to the death of his testator or intestate, in whose right he brings the action, and who is, as it were, plaintiff through him. For wherever an executor or administrator can bring the action in his own right, without naming himself executor or administrator, as when the cause of action accrues after the death of the testator or intestate, yet brings it as executor or administrator, if he be nonsuited, or a verdict be given against him, he shall pay costs,—because, in such case, that presumed ignorance of the precise ground of action, which excuses him from costs, where he sues upon a contract, or other cause of action that arose, or was entered into, in the lifetime of the testator or intestate, does not exist. Here the ground of action happens during his own possession, he alone is conusant of, and privy to it's nature and extent;

Sav. 133.
Dal. 96.
Salk. 207. 314.
3 Salk. 106.
Hutt. 79.
6 Mod. 92, 93, 94.
11 Mod. 135. pl. 17. 174. pl. 18.
Barnes, 119. 141, 2.
Bull. N. P. 332.
B. R. H. 205.
2 Com. Dig. 549. 550.
Per Denison, J. 1 Wils. 172.
Per Ashurst, J. 2 Term Rep. 477.

and, therefore, failing in an action founded upon a matter within his own private knowledge, it is but equitable that he should be liable for the costs. It was formerly a ground of giving, or refusing costs against an executor or administrator, when plaintiff, if the thing or damage recovered was assets; but that is now exploded, for even though the cause of action arise after the testator's death, yet the thing, when recovered, will be assets. The rule, therefore, it seems, now entirely rests upon the distinction above stated; namely, upon the circumstance of it's being necessary or not, to name himself executor or administrator in the action.

Andr. 360, 1. Per Lord Hardwicke, B. R. H. 205. Sed vide 6 Mod. 92. 181. 1 Salk. 207. 314. 3 Salk. 105. 4 Term Rep. 281.

This doctrine will be abundantly illustrated by the following cases.

An executor brought a writ of ravishment of ward, and, issue being joined upon the tenure, it was found against the plaintiff; and the question was, whether the defendant should have costs? In the report of this case by Croke, it is said to have been holden by three judges, of whom Hutton, *J.* was one, that the defendant should not have costs; but in the report of the same case by Hutton himself, which is much fuller than that in *Cro. Car.* that judge declares himself of a different opinion. And from his account of the case, the Court appear to have been equally divided on the question; Croke and Harvey, *Justices*, holding that the defendant ought not to have costs; and Yelverton and Hutton, *Justices*, espousing the contrary opinion. The two last mentioned judges agreed, that in actions brought by

Townley v. Steele, H. 1 Car. 1. Hutt. 78. S. C. by the name of Peacock v. Steer, Cro. Car. 29.

executors upon contracts, obligations, or other things made to the testator, or *de bonis asportatis* in the life of the testator, or upon any *tort* supposed to be done not immediately to the plaintiff, there shall be no costs; but, they said, that in the principal case, though the plaintiff was named executor and his title derived from his testator, yet the action was brought upon an immediate *tort* done to himself, by taking away the ward, whose marriage belonged to him. Holt, *Ch. J.* in commenting upon this case in 6 *Mod.* 94, intimates an opinion against the defendant's right to costs, because, he said, the ward never came into the actual possession of the executor, and could not, therefore, be assets in him; but the fact seems to have been otherwise, for in *Hutt.* 78. the count expressly states the executor to have been possessed of the ward, and that, being so possessed, the defendant *rapuit illum et abduxit.*

Bull v. Palmer, B. R. P. 28 Car. 2. 1 Freem. 424. S. C. 3 Keb. 626. 643. Tho. Jones, 47. 2 Lev. 165. S. P. Agr. 6 Mod. 93. Salk. 207.

The plaintiff, an executor, being nonsuited in an action of *indebitatus assumpsit* upon an account stated with himself, as executor, after the death of his testator, the question, before the Court, was whether he should pay costs.

Because the promise upon the *insimul computassent* created no new cause of action, but only ascertained the old cause, which still remained the debt of the testator.

And Wylde, *Justice*, held that he should; for though the grounds of the account was for matters in the lifetime of the testator, yet the account being made with the executor himself, must necessarily be within his own knowledge, and, therefore, having knowingly brought an action without cause, it was fit he should pay costs. Besides, it was unnecessary for the plaintiff to name himself executor in this action, or to

produce the will, because the ground of action was the account with himself; so in trover, the conversion being alleged in the time of the executor, he shall pay costs.

Contra per Treby, Ch. J. 1 Ld. Raym. 437.

But Rainsford, *Chief Justice*, Twisden and Jones, *Justices, contra*. As to the case put of trover they agreed with Wylde, *Justice*, because there it was entirely unnecessary for the plaintiff to mention that he was executor; but Twisden said that he had always taken the rule to be, that, where the plaintiff must declare and make his title as executor, though the debt accrue in his own time, he is not a plaintiff within the statute (*a*) to pay costs; and here in this case, if he should declare generally upon a *computasset*, he must be nonsuited; the case of *Townley* v. *Steele* is doubtfully reported, but must be ruled on that difference; (to which Rainsford, *Ch. J.* agreed), and what the executor recovers in this action will be assets; therefore, by three judges, the plaintiff was held not liable to costs.

(*a*) 23 H. 8. c. 15.

Supra.

This was *indebitatus assumpsit* by the plaintiff for money due to the intestate, paid to the defendant after the intestate's death, to the use of the plaintiff his administrator. The plaintiff was nonsuited. And whether he should pay costs or not, was the question. The case was as follows; the intestate was a soldier in a regiment, of which the defendant was colonel, and died having arrears of his pay due to him from his majesty, and the plaintiff took administration, and afterwards the money was paid into the hands of the defendant, to discharge the arrears of the regiment; and this action was brought for the intestate's proportion of the money on account of his arrears. Treby,

Nicolas, administrator of Wildborn, v. Killigrew, H. 10 W. 3. 1 Ld. Raym. 436.

Chief Justice.—The plaintiff has declared of so much money received to his own use after the death of the intestate; and therefore the naming himself administrator is not to any purpose; and we ought to take the case as it is upon the declaration. And by him and POWELL, *Justice*, if *A.* be indebted to the intestate before his death, and after his death *A.* pays the said debt to *B.* by direction of the administrator, there the administrator may sue *B.* without naming himself administrator; and though he does name himself administrator, it is void, and he must pay costs, if the action be found against him. Or if *A.* pays it to *B.* to the use of the administrator, without his direction, yet the administrator may have an action against *B.* in his own name, and he shall pay costs. But in such case he hath election, to bring an action against *A.* or *B.* the first debtor; and if he brings it against *A.* it must be as administrator, and he shall not pay costs. For in all cases where an executor or administrator sues for a debt or other thing belonging to the testator or intestate, and grounds his action upon the same contract that was to the testator, &c. he shall not pay costs if he fail in his suit: but if he ground his action upon a contract expressed, or by implication and operation of law, which accrues to him after the death of the testator; there the action lies in his own name, and the naming him executor, &c. is void, and he shall pay costs. And in this case these two judges were of opinion, that the money being paid to the defendant, to discharge the arrears of the regiment, there being an arrear due to the plaintiff as administrator of *Wildborn*, the plaintiff might have *indebitatus assumpsit* against the defendant for so much money received to his use; although no money

6 Mod. 92. Same doctrine confirmed by Holt, Ch. J.

was expressly paid to the defendant to the use of the plaintiff. But admitting that in this case the plaintiff ought to name himself administrator, to entitle himself to this money due to him, and received by the defendant; the duty due to the intestate being altered, and being become a duty due from another person after the death of the intestate, the plaintiff ought to pay costs. And *per* TREBY, *Chief Justice*, if the executor, &c. bring an action upon an *insimul computasset* with himself after the death of the testator, he shall pay costs; and yet it is for a duty due to the testator, and not altered, for the accounting with the executor does not give a new duty, but only ascertains that which was due before.

Vide sup. cont.

INDEED in a case subsequent to that of *Nicolas* v. *Killigrew*, the doctrine laid down in the latter appears to have been contradicted. The plaintiff brought *assumpsit* for money of his testator had and received, after his death, by the defendant, to the use of the plaintiff, as executor, and was nonsuited. And it was holden, that the plaintiff should not pay costs, because he could not sue otherwise than as executor; and that it was immaterial whether the money was received by the defendant since the death of the testator, or before: for, supposing it since, it was not assets until recovered.

Eaves v. Mocato, B. R. P. 2 Anne. Salk. 314. S. C. 2 Ld. Raym. 864.

BUT it has been decided, in more cases than one, since the determination in *Eaves* v. *Mocato*, that an executor may support an action in his own right for money had and received after the death of his testator. And, perhaps, it may be a doubt, whether even the resolution in *Eaves* v. *Mocato* really

Wallis v. Lewis, M. 4 Ann. 2 Ld. Raym. 1215. Modeley v. York, T. 6 Ann. 11 Mod. 135. Acc. per Ashhurst, J. 2 Term. Rep. 477.

militated against this proposition, for although the reports of that case, in *Salk.* 314. and 2 *Ld. Raym.* 864, state the action to have been *assumpsit* for *money had and received* by the defendant, subsequent to the death of the testator, yet in *Salk.* 207, and 6 *Mod.* 93, the same case was cited at the bar as having been an action of *indebitatus assumpsit on an account stated with the plaintiff, the executor,* and *as such* agreed, by the Court, to be good law (1.)

Jenkins v. Plume, or Plombe, T. 3 Ann. B. R. 6Mod. 91. 181. S. C. Salk. 207. 3 Salk. 105. Holt, 313. 11 Mod. 174.

THE case of *Jenkins* v. *Plume,* was an action of *indebitatus assumpsit* by the husband and wife executrix, in which they declared that the defendant was indebted to them in so much money received by the defendant to the use of the plaintiffs, in right of the wife as executrix, and at the trial the plaintiffs were nonsuited. It was resolved, that the defendant should have the costs of this nonsuit, because the plaintiff needed not have named himself executor, the action being founded upon a contract with himself;—for, by the Court, if the plaintiff, having married the executrix, had appointed *J. S.* to have received this debt which was due to the testator, and he had accordingly received it, that had been a good payment and discharge of the first debt, and *J. S.* would have then become indebted to the plaintiff by a contract in the plaintiff's

(1) Lord Chief Justice *Lee,* in delivering the judgment of the Court, in the case of *Marsh* executrix, v. *Jennedy, Andr.* 359. observed, that he had seen a manuscript note of *Eaves* v. *Mocato,* which agreed with the report of that case in *Salk.* 314. "But," says his lordship, "it does "not appear who was in court; "and the determination seems to "be a very extraordinary one. That "case must not, I think, stand for "law, it being directly contrary to "*Jenkins* v. *Plume,* which was sub- "sequent to it, and also to *Nicolas* "v. *Killigrew,* which was before it; "both of which cases are exactly "agreeable."

time, *viz.* the appointment and receipt. And here, though the defendant received the money without any previous appointment of the plaintiff, yet the plaintiff, by bringing the action, having assented to the receipt, it amounts to an appointment, and a discharge of the first debtor, and makes a contract between the defendant and him; and here, he needed not have named himself executor, it being upon a contract with himself. And the true rule is, that where the executor is not obliged to name himself executor, he shall pay costs upon a nonsuit; and the naming of himself executor, in such case, is surplusage, and shall not shelter him from costs. And, in this case, if the receipt was after the plaintiff's marriage with the executrix, the husband alone should have brought the action; but if the receipt were in the wife's time, before the marriage, the husband and wife ought to join in the action.

DEBT, by an executor, upon a bond entered into by the defendant to the testator. Upon *oyer*, it appeared to be conditioned, "that the defendant should not hunt in any of "the lands of the testator," and, in the replication, a breach was assigned by a hunting in the executor's time. And on issue thereupon, a verdict was found for the defendant. Motion that the plaintiff might pay costs because the hunting, which was the cause of action, arose in the time of the executor, and was a matter within his own knowledge. *Sed non allocatur*; for, by the Court, the bond is the cause of action, and the plaintiff could not sue but as executor.

Portman v. Came, B. R. H. 12 G. 1. 2 Ld. Raym. 1413. S.C. 1 Stra. 682.

To an action of debt brought by an administrator upon a bond to the intestate, the defendant pleaded payment to the

Jenster v. Saunders, B.R. T. 22 Car. 2.

2 Keb. 679. pl. 63. S. C. 1 Vent. 92. R. acc. in an action of *assumpsit* in Taylor v. Barebone, P. 27. Car. 2. B. R. 1 Bac. Abr. 518.

plaintiff himself; and, on the trial, the defendant obtained a verdict. It was insisted, that the plaintiff, though an administrator, ought to pay costs, because, having received the money himself, he had knowingly instituted a groundless action. But it was resolved, that the plaintiff should not pay costs; for the action was merely in right of the intestate, and the falsity of the suit did not alter it.

Anon. C. B. H. 2 Car. Litt. 5.

ACTION of debt by the administrator of *Hale*, plea that *Hale* made one *J. S.* his executor, who had administered and was living, and, issue being joined thereon, the plaintiff, at the trial, was nonsuited. Upon a motion on the part of the defendant for costs, it was holden that an administrator, who hath obtained letters of administration from the ordinary, is not liable to costs, but that it is otherwise of an executor *de son tort*, who sues in his own wrong, and that it was so adjudged in a former case of *Hayward* v. *Davies*.

Anon. T. 10 Jac. Brownl. 79. Sed quære.

BUT in a subsequent case, which was debt by executors, plea that the plaintiffs were not executors, and found for the defendant, the Court held that the plaintiff was not liable to costs, for the jury might find an untruth.

Jones v. Wilson, B. R. M. 8 Ann. 11 Mod. 256.

IN an action by an administrator, the declaration consisted of two counts; one upon a promise to the intestate in his lifetime, the other upon a promise to the plaintiff, *as administrator*. And, upon the trial, the plaintiff was nonsuited, in consequence of which the defendant moved for costs.

Vide 1 Wils. 171. 2 Str. 1271. 3 Term Rep. 659.

AND POWELL, *Justice*, said, that these two counts could not be joined; and if an entire judgment had been given,

judgment should have been arrested. Perhaps it might have been good by taking judgment upon one count only; but, here, the plaintiff must pay costs, because the nonsuit goes to the whole. And it was ruled accordingly by POWELL, POWIS, and GOULD, *Justices*; *absente*, HOLT, *Ch. Justice*. 4 Term Rep. 277.

THE plaintiff, as the executor of an attorney, declared, that the testator, in his lifetime, was employed by, and did business for the defendant, but dying before it was completed, the plaintiff caused the same to be finished, in consideration whereof the defendant undertook to pay. The plaintiff was nonsuited at the trial; and now the defendant moved for costs. Marsh v. Yellowly, B. R. H. 12 G. 2. 2 Stra. 1106. S. C. by the name of Marsh v. Jennedy, Andr. 356.

Et per Curiam, (upon consideration) we are all of opinion, that the plaintiff ought to pay costs. The executor might certainly have maintained an action in his own right, for this demand: it falls within the reason of paying costs, where an executor declares upon a conversion in his own time.

IF an executor or administrator be nonsuited, or a verdict be found for the defendant, in an action of trover for a conversion of the goods of the testator, &c. in his lifetime, the plaintiff is not liable to costs; because he could only support the action in his representative capacity, in right of the testator or intestate. Downes v. Shaft, T. 13 and 14 G. 2. Barnes, 129. 3 Salk. 103. acc.

AND in one case it was ruled, that an administrator is not liable to costs in an action of trover stating a conversion *after* the death of the intestate; because the action is in right of the intestate, though the conversion happened in Mason v. Jackson, C. B. T. 34 Car. 2. 3 Lev. 60.

the administrator's time; and whatever damages or costs are either lost or recovered must be upon the intestate's account.

Latch, 214. 220. 1 Keb. 46. 2 Keb. 738. Cro. Car. 219. 1 Jones, 241. 8 Mod. 109. Com. 162. Skin. 400. 1 Freem. 424. 1 Vent. 92. 109. Salk. 314. 3 Salk. 105. B. R. H. 204. 2 Stra. 785. 1107. Cas. Pr. C. P. 61. Barnes, 132.

But this case stands contradicted both by more ancient and modern resolutions by which it should seem to be established, that an executor or administrator *is liable to costs*, on a nonsuit, or verdict against him, in an action of trover where the *conversion is stated in his own time*, because, in such case, he might have brought the action *in his own right*, the gist of the action, the conversion, being subsequent to the death of the testator or intestate.

And this point was, again, agitated, in a very late case, when it was determined, by the unanimous opinion of the Court of *King's Bench*, that an executor, declaring upon a trover and conversion in the testator's lifetime, and a trover and conversion after his death, in distinct counts, is not, upon a nonsuit, liable to costs; if the evidence, adduced at the trial, was applicable only to the first count.

Cockerill and wife, executrix of Moody, v. Kynaston, B. R. P. 31 G. 3. 4 Term Rep. 277.

Trover for goods. The first count stated the trover and conversion to have been in the lifetime of the testator. The second count stated the trover in the life of the testator, and the conversion afterwards. The third count was for a trover and conversion after the death of the testator. At the trial the plaintiffs were nonsuited; upon which, a rule was obtained to shew cause why they should not pay costs to the defendant.

Lord Kenyon.—If the plaintiffs could have sued in their

individual capacity, they would have been liable to pay the costs: but they could only sue in their representative character, to obtain the possession of assets which belonged to the wife, as executrix; and, therefore, they are exempt from paying costs. It appears that the only evidence offered at the trial, was applicable to the first count.

Ashurst, *Justice.*—Upon the first count it is admitted that the plaintiffs would not have been liable to costs; and, on the trial, the evidence was brought to support that count only. That makes an end of the present question; and the addition of the other counts ought not to vary the case, for it does not appear that they were added from litigious or vexatious motives, but from prudence, merely to take advantage of any other evidence which the plaintiffs might obtain before the trial.

Buller, *Justice.*—The cases upon this subject are so contradictory, that it is impossible to reconcile them: but those which are best founded on reason shew that the plaintiffs, in this action, ought not to pay costs. The case in 3 *Lev.* 375, is a very material one, where the question was, whether the administrator should pay the costs of a writ of error? For whether there were any error or not was apparent on the record, and must have been known to the intestate; but, as it was necessary for him to sue in the character of administrator, it was held that he was not liable to pay costs. The case in 2 *Lev.* 165, where the plaintiff executor only declared on an account stated by the defendant and himself, is

also a very strong one. So too is that in 3 *Lev.* 60. There are indeed cases the other way. And therefore, it is necessary to consider the principle upon which the exemption stands. One rule is, that if a plaintiff name himself executor when he need not, and fail, he shall pay costs; as where his declaration states a cause of action due to him personally. Another rule is, that a plaintiff cannot join in the same declaration a cause of action in his character of executor, with another which accrued in his own right. And that will govern the present question; for if it be true, that the last count in this declaration applies to a cause of action in the plaintiff's individual capacity, the declaration is bad upon the face of it, and the defendant might have demurred to it. But I am of opinion, that every cause of action stated in the declaration accrued to the plaintiffs in their representative character; for though the conversion be stated in the two last counts to have been made in the lifetime of the executrix, yet it was a cause of action which accrued to the wife as executrix, and must have appeared so at the trial. If the goods, which were the subject of the action, never were in the actual possession of the executrix, it was absolutely necessary for her to declare in that character: and if no demand were made in the lifetime of the testator, it was necessary to declare on a conversion after the testator's death. Even on the third count, we are not to conclude that the executrix ever had actual possession of the goods; and if not, they were not assets till recovered. But the principle, stated in some of the cases against the rule, is the true one, that, whether the conversion happened before or after the testator's death, if the

Vide 6 Mod. 94. 181. Salk. 208.

Vide Salk. 314. 2 Lev. 165. 3 Lev. 60. Andr. 361.

goods when recovered would be assets in the hands of the executrix, she must sue for them in her representative capacity; and then she is not liable to costs.

GROSE, *Justice*.—Of the same opinion. Rule discharged.

ALTHOUGH, after the payment of money into court, an executor proceed to trial, and recover a verdict for a less sum, he is not liable to pay any costs.

THUS, in an action of *assumpsit*, the defendant brought 16*l.* into court upon the usual motion, that the plaintiff (who was an executrix) should proceed at the peril of costs; the plaintiff proceeded to trial, and had a verdict for no more than 13*l.*; and a motion was afterwards made, that the plaintiff should pay costs, and that the 3*l.* overplus paid into court, should be paid unto the defendant; the Court complied with the latter part of the motion, but refused to make the plaintiff, being an executrix, pay costs.

Knight, executrix, v. the Duchess of Hamilton, In Scacc. P. 1719. Bunb. 44.

IT was formerly holden, that money could not be paid into court in an action by an executor or administrator, because the executor or administrator is not liable to costs. But the law is now altered in this particular, and the courts will permit a defendant to pay money into court, notwithstanding the plaintiff may sue in either of those characters; and, in one case, where the point was agitated, the Court, on consideration, resolved that money might be brought into court though the suit was by an executor, and said, that the effect of it would be, *not* to make the executor *pay*, but only *lose*

Gregg's Case, B. R. P. 5 Ann. Salk. 596. Barnes, 280. 286.

Crutchfield v. Scott, B. R. P. 1 G. 2. 2 Stra. 796. Vide a contradict. Rep. S. C. in Barnard, K. B. 47.

his *subsequent costs*; and that it had been before allowed in the case of *Baker* v. *Turbeville*, *M.* 3 *G.* 1. Yet in 3 *Salk.* 105. it is said, that, if an executor proceed in his action after the payment of money into court by the defendant, he does it at the peril of costs; but, perhaps, little stress is to be laid upon this part of *Salkeld*'s report, as it was not the principal point in the case, and as it was prior in point of time to the resolution in *Gregg*'s case, wherein it was holden, that in actions by executors or administrators money could not be paid into court; at any rate, it is contrary to the opinion of the Court in *Crutchfield* v. *Scott*; and the decision, by the Court of *Exchequer*, in *Knight* v. the Duchess of *Hamilton*.

B.R.H, 8 W. 3.

Bunb. 44.

WHERE the plaintiff is an executor or administrator, he is not liable to costs under the 5 *G.* 2. c. 30. s. 7, though the defendant plead the general plea of bankruptcy, and obtain a verdict.

Martin and ux. administratrix, v. Norfolk, a bankrupt, C.B. M. 31 G. 3. H. Bl. 528.

THUS, to an action of *assumpsit* brought by an administrator, on promises made to the intestate, the defendant pleaded the general plea of bankruptcy, and obtained a verdict. In consequence of which, it was moved, that the prothonotary might be directed to tax the defendant his costs, on the ground that the statute of 5 *G.* 2. c. 30. s. 7. gives a bankrupt, when sued for a debt due before the bankruptcy, and obtaining a verdict, *full costs*. In support of the motion it was urged, that this statute contained no exception in favour of executors and administrators. And that it could not have been the design of the legislature, by the act, to exempt any plaintiff from paying costs to the bankrupt, who was

divested of all his property, and had not otherwise the means of defending actions which might be brought against him. That though it was true, that executors and administrators were not presumed to be fully cognizant of the rights of the testator or intestate, and therefore, as no malicious motives could be imputed to them in bringing an action, not liable to costs, under the 23 *H.* 8. c. 15. or 4 *Jac.* 1. c. 3. yet that rule was not applicable to the present case, a commission of bankruptcy being a matter of public notoriety, of which the plaintiffs might have informed themselves, and of which they could not be presumed to be ignorant. But,

THE Court held the plaintiffs not liable to costs, being clearly of opinion, that the statute 5 *G.* 2. c. 30. ought to be construed in the same manner as 23 *H.* 8. c. 15. and 4 *Jac.* 1. c. 3. Rule refused.

NEITHER does an executor or administrator pay costs under the statute 14 *G.* 2. c. 17, upon a *judgment* against him, *as in the case of a nonsuit*, for not proceeding to trial according to the course and practice of the court, in which the suit was instituted.

Howard, executor, v. Radburn, H. 15 G. 2. Barnes, 130. Per Cur. acc. 4 Burr. 1928. B. R.

BUT an executor or administrator shall pay costs, if he be guilty of any *laches or delay*, in the progress of a cause.

THUS he shall pay costs for not proceeding to trial, pursuant to his notice.

7 Mod. 98. 118. Salk. 314. 3 Salk. 105. 2 Ld. Raym. 866. 1 Stra. 33. Barnes, 316. 3 Burr. 1305. 1585, 6.

BUT this must be understood only where his not going on

to trial was *his own laches*, and not the result of inevitable accident.

Ogle, executor, v. Moffat, M. 17 G. 2. Barnes, 133.

For where, on a motion for costs against the plaintiff, an executor, for not proceeding to trial according to notice, it appeared, that the cause was entered with the judge's marshal, that one material witness, who had been served with a *subpœna*, could not attend, and that another was disabled from attending by a fall from his horse, the Court rejected the motion, saying, that the plaintiff had been guilty of no wilful default; if he had, he must have paid costs, though he sued as executor.

Bennet, administrator, v. Coker, B. R. M. 7 G. 3. 4 Burr. 1927. S.C. Say. on Costs, 96, 7.

And the principle, adopted in the last case, is confirmed by a subsequent resolution in the Court of *King's Bench*; which was on a motion on behalf of the plaintiff, who was an administrator, for leave to discontinue *without* payment of costs.

It was an action upon a bond, against an heir; and, on the plaintiff's not trying it according to notice, the defendant moved for judgment as in the case of a nonsuit, whereupon the plaintiff undertook to try it peremptorily. When it came down to trial, he *first* discovered that the estate had been conveyed; and was then satisfied that there was a deed of conveyance, which would be produced at the trial. Whereupon he declined to go to trial (1); and now desired to discontinue.

(1) According to Mr. Serj. *Sayer*, the plaintiff actually entered the cause for trial, and afterwards withdrew the record.

AGAINST the motion it was urged, that as an executor shall pay costs for not going on to trial, after having given notice of trial, so he ought where he has not tried pursuant to his *positive undertaking*, after a motion has been made against him for judgment as in case of a nonsuit. For this was his own laches; he ought to have been previously informed of the facts on which he grounded his action.

BUT the plaintiff's counsel undertaking not to bring another action,

LORD MANSFIELD, said, that it might be reasonable to make him pay costs, where the executor might probably bring another action, but here was no double vexation. The plaintiff agrees not to try it; but withdraws the cause at the assizes, upon finding that there is a deed against him. So that there is an end of the matter.

MR. *Justice* ASTON observed, that the defendant had saved all the fees of court; which he must have paid, if there had been a verdict.

MR. *Justice* YATES.—It is not in *all* cases, that an executor shall discontinue *without* paying costs; for if it is plainly his own fault, he shall not have such leave. So, in case of not going on to trial, if it is his own laches, he shall pay costs. (To which Lord MANSFIELD agreed). Therefore, the question is, whether there is *laches or delay*, or whether it be a *fair* transaction? Now this was fair and candid. The plaintiff has done better for the defendant,

than if he had gone on to trial; he discovered he was in the wrong, and, as soon as he knew it, desisted.

THE Court accordingly granted the motion to discontinue without costs, but the plaintiff was not to bring a new action, without leave of the Court.

Nunez, administrator, v. Modigliani, C.B.P. 29G. 3. H.Blackst.217.

BUT, from the report of one case, it appears that costs were paid by an administrator, for withdrawing the record before trial.

INDEED the liability of an executor or administrator to costs, in the case of withdrawing the record, was not controverted in *Nunez* v. *Modigliani*, but must have been tacitly admitted; for the sole question, before the Court, was, whether the costs that should be taxed and allowed to the defendant, on account of the plaintiff's withdrawing the record, should or should not be set off against certain costs which had been taxed and allowed to the plaintiff, the administrator, under an order of *Nisi Prius*, made in another action? From the plaintiff's acquiescence in the payment of costs in this case, it should seem, that the circumstance of withdrawing the record must have been unequivocally imputable to his own laches, which, according to the reasoning in *Ogle* v. *Moffat* and *Bennet* v. *Coker*, is, in such cases, the true test of an executor's or administrator's liability to costs. However, be that as it might, as the point passed *sub silentio* in the Court, this case ought not, perhaps, to be considered as militating against the principles which governed the decisions abovementioned.

It does not appear to be established whether or not an executor or administrator is liable to pay costs upon discontinuing his suit; but though no general rule can be extracted from the cases on this subject, which are contradictory, yet, upon principle, and the reasoning of the Court in some of the following cases, it seems that, where the necessity of discontinuing is induced by the laches or default of the executor himself, the condition of paying costs will, generally, be annexed to the rule to discontinue.

In *Eccleston* v. *Clipsam*, the Court gave the plaintiff leave to discontinue, upon a motion in arrest of judgment after a writ of inquiry, without costs, because he was an executor. Eccleston v. Clipsam, B. R. T. 20 Car. 2. 2 Keb. 385.

And, in another case, the plaintiff, who was an administrator, had leave, after demurrer to his replication and argument thereon, to discontinue without costs. Baynham v. Matthews, B. R. T. 4 G. 2. 2 Stra. 871. S. C. Fitzgib. 130.

Again, an administrator, having discontinued one action by leave of the Court without costs, commenced another action for the same cause; upon which the defendant moved that the proceedings in the second action might be stayed, till the plaintiff had paid the costs of the first; but the motion was denied. Bird v. Smith, B. R. T. 5 G. 2. 2 Kely, 70. S. C. 2 Barnard. K. B. 154.

But in *Haydon* v. *Norton*, where leave was given to an executor to discontinue after a demurrer to his bill against a member of parliament, it was resolved, that the plaintiff, though an executor, ought to pay costs, the discontinuance being rendered necessary by his own default. M. 6 G. 2. Cas. Pr. C. P. 79.

M. 6 G. 2.

AND in a short note of the same case, seemingly, by the name of *Hale*, administrator, v. *Norton*, in *Barnes*, 169. the Court are made to lay it down, as a general proposition, that a plaintiff, though an administrator, cannot discontinue without payment of costs.

Harris, executor, v. Jones, B. R. H. 4 G. 3. 3 Burr. 1451. S. C. 1 Blackst. 451. Bull. N. P. 332.

IN a subsequent case, a motion was made for leave to discontinue without payment of costs, the plaintiff being an executor. It was urged, on the part of the defendant, that the action was brought by one executor in his own name only, when he knew that there were others subsisting, and had thereby wantonly put the defendant to great expence.

AND DENISON, WILMOT, and YATES, *Justices*, (*absente* Lord MANSFIELD) were clear, that giving an executor leave to discontinue, was a matter of discretion in the Court; and that they ought not to give him such leave, in any case where he had knowingly brought his action wrong, unless he would consent to pay costs. And that there were many cases, where executors, applying for favours, were obliged to pay costs. Rule absolute, on payment of costs.

Vide supra, 190.

AGREEABLE to this mode of reasoning is the determination in the case of *Bennet* v. *Coker*, where, after a peremptory undertaking to go to trial, in consequence of a motion for judgment as in the case of nonsuit, the plaintiff, an administrator, obtained leave to discontinue without payment of costs, because it appeared to be a fair transaction. And, in this case, YATES, *Justice*, expressly lays it down, that it is not in *all* cases, that an executor shall discontinue without

paying costs; for if the necessity of discontinuing were plainly owing to his own laches or default, he shall not have such leave, but upon payment of costs.

AGAIN, in a still later case, the Court of *Exchequer*, on motion, ordered that the plaintiff be at liberty to discontinue his action without costs, the plaintiff suing as an administrator. Hugh, administrator, v. Lloyd, executor, T. 9 G. 3. In Scacc. Burt. Pr. Excheq. 156.

AND in the same book it is said, that, though executors and administrators, when plaintiffs, had been made subject to the costs of discontinuing, yet, within a few terms past, the courts had been more indulgent, because as such plaintiffs might proceed to judgment, without paying costs, either of a verdict against them, or a nonsuit, it was hard to put the parties to such expences, when the plaintiff is willing to relinquish his suit sooner. Ibid.

AN executor or administrator shall pay costs upon being *nonprossed* for want of a replication, because guilty of a default. Lamley, executor, v. Nichols, M. 4 G. 1. Cas. Pr. C. P. 14.

AND in another case, where the question was, whether an executor was liable to pay costs upon a judgment of *nonpros*, for not declaring in due time, it was alleged, that this being the executor's own fault he ought to pay costs; his proper method would have been to have discontinued his action, in which case, it was said, he would not have been subject to costs. Hawes, executor, v. Saunders, B. R. M. 5 G. 3. 3 Burr. 1584.

YATES, *Justice*, observed, that the case of a *nonpros* and a discontinuance differ. The former arises from the exe-

cutor's own delay: and therefore he thought, and so also did Lord MANSFIELD, that it was similar to the case of his not going on to trial according to his notice.

THE rule was enlarged; and the judgment of the Court was, on a subsequent day, delivered, as follows, by

LORD MANSFIELD.—The privilege of executors is too great already. They ought to be properly informed, before they bring actions. The distinction made between a discontinuance and a *nonpros* is a very good one; it is very reasonable that the executor should pay costs in the present case. And adjudged accordingly.

Yearb. 31 H. 6. 13. Bro. Tit. executors, 164. Hard. 165. Plowd. 183. Hutt. 79. Bull. N. P. 332.

WHERE a party defends as executor or administrator, he is liable to costs in all cases, and in the same manner, as other defendants; and the judgment as to the costs, is *de bonis testatoris si, &c. et si non, tunc de bonis propriis.* Gilb. H. C. P. 269. 2 Cro. Pr. 466. Et vide 1 Ro. Abr. 933. Cro. Car. 226.

Imp. Pr. C. P. 2d. Ed. 374. Imp. Pr. K. B. 3d. Ed. 275. marg.

YET it is said to have been determined in a late case, by the Court of *Common Pleas*, that no costs shall be allowed on a judgment of assets *in futuro*, on a plea of *plene administravit* only.

IF a bankrupt executor plead a false plea, in an action commenced against him, between the issuing of the commission and the obtaining of his certificate, by a creditor of his testator, he is liable to be taken in execution for the costs.

Howard v. Jemmet, exe-

THE case was as follows;—subsequent to the issuing o

the commission against the defendant, an action was brought against him as executor, upon a bond of his testator; to this action the defendant pleaded a false plea, which, at the assizes, after the obtaining the certificate, but before the confirmation thereof, was found against him; and thereupon a judgment was entered up *de bonis testatoris, si, &c.* for the debt, and *de bonis propriis, si non, &c.* for the costs. The defendant's goods were, afterwards, taken in execution upon a *fieri facias*; in consequence of which, a rule was obtained to shew cause why the *fieri facias*, and all proceedings thereon, should not be set aside as irregular, and contrary to the statute of 5 *G.* 2. c. 30. s. 7. for the protection and indemnification of bankrupts.

cutor, B. R. H. 3 G. 3. 3 Burr. 1368. S.C. 1 Blackst. 400.

By the Court.—The pleading a false plea was the defendant's own act, and his own fault; and the judgment and execution *de bonis propriis*, for costs, was singly owing to this his false plea; which was subsequent to the issuing of the commission; consequently these costs were not such a debt as could have been proved under the commission; and, therefore, cannot be discharged by the certificate. Rule discharged.

Where an executor pleads the general issue, *non assumpsit*, and a specialty debt, sufficient to cover the assets, the Court will permit him to withdraw the former plea, upon payment of the costs occasioned by that plea only.

Thus, in an action of *assumpsit*, the defendant, an executor, having pleaded, by leave of the Court, 1st, the general issue, and, 2dly, certain debts by specialty, and *non assets*

Dearne v. Grimp, executor, C. B. P. 19 G. 3. 2 Blackst. 1275.

ultra, it was moved that he might have leave to withdraw the general issue, on paying the costs which had been occasioned by that plea.

THE prothonotaries reported, that if the cause had gone to trial in it's present state, and a verdict had been found for the plaintiff on the first plea, and, for the defendant, on the second, the defendant must have been liable to costs *de bonis propriis*. But if the second plea only had been originally pleaded, the plaintiff (who must at all events have judgment *de bonis testatoris cum acciderint*) would only have his costs, eventually, *de bonis testatoris*.

DE GREY, *Chief Justice*.—Any delay to the plaintiff occasioned by the executor will entitle him to recover costs *de bonis propriis* of such executor, which seems to be the ground of the practice reported by the officers of the Court. The question now is, upon what terms the defendant shall be permitted to withdraw his plea. It is not a matter of right, but in the discretion of the Court. The plaintiff is now in possession of a right to all his costs from the executor, if he goes on and proves his debt, which is admitted to be a just one. I see no reason for depriving him of this right, and am, therefore, of opinion, not to make the rule absolute, without payment of the whole costs hitherto incurred.

GOULD, *Justice*.—I am of a different opinion. There has been no delay on the part of the defendant, nor has the plaintiff been put to any costs (except those occasioned by the first plea) beyond what he must have incurred to recover

judgment *de bonis testatoris*. He must declare, must sign an interlocutory judgment, and have a writ of inquiry afterwards, before he could have judgment to recover *de bonis testatoris cum acciderint*.

BLACKSTONE, *Justice*.—I am of opinion with brother GOULD. No case has been cited upon this point, nor indeed could any case occur till since the statute of Queen *Anne*, which permitted the pleading of several matters. I consider the two pleas as one complicated one, containing variety of matter. In such a case, if the defendant moves to amend by striking out some facts, which he finds he cannot support, the known course is, that he shall only pay costs occasioned by such amendment. And yet, if he had gone on, and failed in proving his plea, the plaintiff would recover his full costs, and may, therefore, be as well said to have acquired in that case, as in this, an inchoate right to all the costs of the action. If the plaintiff's *extra* costs are now paid, he is just in the same plight, as if the plea had not been put in; and is put to no other expence in obtaining his judgment, than he, necessarily, must incur.

NARES, *Justice*,—concurred with GOULD and BLACKSTONE, *Justices*. No injustice is done to the plaintiff, no right altered by allowing this amendment. Rule absolute, on condition to bring no writ of error, or bill in equity.

A DEFENDANT, executor or administrator, is entitled to costs, where judgment is given for him. Cro. Eliz. 503. Bull. N. P. 332.

SECT. II.

Of Costs, where a Plaintiff sues, upon a popular Statute, as a common Informer, or Prosecutor qui tam, *&c.*

Vide ante, 19.
1 Ro. Abr. 574.
2 Keb. 781.
1 Vent. 133.
3 Lev. 374.
1 Lutw. 200.
Nels. Lutw. 62.
Salk. 206.
Carth. 230.
Holt, 172.
Comb. 449.
1 Ld. Raym. 172.
Cas. Pr. C. P. 87.
Bull. N. P. 333.
4 Burr. 2021.
2 Term Rep. 154.
H. Blackst. 13.

IT hath been already observed, and is clearly established, that a common informer upon a popular statute, or a prosecutor *qui tam*, &c. (who is considered in the same light with a common informer, *Salk.* 30.) shall, in no case whatsoever recover costs, whether he may sue for a certain, or an uncertain penalty, unless costs are expressly annexed to a recovery by the statute inflicting the penalty; for, by the common law, a common informer cannot be entitled to costs, since that doth not give costs in any case. His claim to them is equally ill founded upon the statute of *Gloucester*, which gives a title to costs in such actions only, where the demandant shall recover damages; but this necessarily presupposes some damage to have been done to the demandant in particular, which cannot, with propriety, be said in a popular action, the ground of which is an offence against the public, and not an injury to an individual; and, therefore, such actions have been, uniformly, construed to be out of the benefit of that statute.

Wood, qui tam. v. Johnson, C. P. T. 17 G. 3.
2 Blackst. 1157.
Vide 4 Burr. 1929.
Walker v. King, T. 31 G. 2.
Bull. N. P. 197.

BUT on a *bonâ fide* composition of a penal action, by leave of the Court, the plaintiff may be allowed a reasonable sum for his costs. And, on motion, the defendant may pay the penalty into court, with costs.

IT hath been shewn in a former part of this treatise, that, in an action on a statute by the *party grieved*, for a certain penalty, given by such statute, costs are recoverable; because, such penalty being intended as a recompence for the damage or injury, which he, in particular and individually, sustained from the offence prohibited, if he could recover no more than that specific sum, without any indemnification for his costs, it would be, frequently, vain and nugatory to sue, since the costs of suit might exceed the amount of the sum recovered. Besides, the party grieved has a right of action vested in him, antecedent to the commencement thereof; for as soon as the grievance is committed, the penalty, thereby incurred, becomes a debt due to him from the offender, and he is entitled to recover damages for it's detention, after demand, and, consequently, costs also, under the statute of *Gloucester*, and this distinguishes it from the case of a common informer, who prior to the instituting of the suit, or, perhaps, till judgment, hath no vested right or interest in the penalty sued for.

Vide ante, 17.

BUT where, by a statute, the penalty is generally limited to any one that will sue for it, and the party grieved happens to bring the action, he must bring it as a common informer, and shall not have costs, if no costs are given by such statute.

T. 15 G. 1. C. B. Bull. N. P. 33. Vide 2 Hawk. P. C. 6. Ed. 381.

FOR redressing of divers disorders in common informers, and for the better execution of penal laws, the 18 *Eliz.* c. 5. s. 3. which is made perpetual by 27 *Eliz.* c. 10. enacts, "That if any informer or plaintiff, upon any penal statute, "shall willingly delay his suit, or shall discontinue, or be

A common informer delaying or discontinuing his suit, &c. to pay costs.

" nonsuit in the same, or shall have the trial or matter passed " against him therein, by verdict or judgment of law; that " then, in every such case, the same informer or plaintiff " shall yield, satisfy, and pay unto the party defendant, his " costs, charges, and damages, to be assigned by the court " in which the same suit shall be attempted. For the re- " covery and execution whereof, every such defendant shall " have his *capias ad satisfaciendum*, *fieri facias*, or *elegit*, to " be awarded to him, as in other cases of execution."

This act not to restrain suits for penalties given to persons certain, and not generally.

18 *Eliz.* c. 5. s. 6. " Provided, that this act shall not re- " strain any certain person, body politic or corporate, to " whom or to whose use any forfeiture, penalty, or suit, is or " shall be specially limited or granted, by virtue of any sta- " tute, and not generally to any person that will sue, but " that every such certain person, body politic, or corporate, " may sue or inform, as if this act had never been made."

Nor to officers used to exhibit informations, &c. by virtue of their offices.

18 *Eliz.* c. 5. s. 7. " Provided also, that this act shall not " extend to any such officers of record, as have, in respect of " their offices, heretofore lawfully used to exhibit informa- " tions, or sue upon penal laws, nor to any officers inform- " ing or pursuing for matters only concerning his or their " offices."

Pie's Case, T. 17 Jac. 1. Hutt. 35. 2 Keb. 106. Gilb. H. C. P. 271, 2. acc.

WHERE, after a verdict for the informer, in an informa- tion upon a penal statute, judgment is given against him, because the statute on which he grounds his information is discontinued, or not in force, he is liable to pay costs within the intent of the 18 *Eliz.* c. 5; for this statute being made

for the ease of the subject, shall have a liberal construction. It's object was to prevent all vexatious informations, and, therefore, it intends to give costs where the cause passeth against the informer, either through defect of matter or form; Per HOBART and HUTTON, *Justices*;—WINCH, *Justice*, doubted of this special case, because the matter was found for the informer, but he agreed, if the judgment were given upon demurrer or special verdict, costs should be given. And WARBURTON, *Justice*, was of opinion, that there should be no costs, because the informer was incapable of suing upon a statute which was discontinued; and so if the venue were misawarded; and he said, that he had conferred with the Chief Baron upon the subject, who also held that there should be no costs in this case.

WHERE, after a verdict for the plaintiff in an action upon a popular statute, judgment was arrested for a defect in the pleadings, the defendant had no costs. Keldridge's Case, 25 Eliz. B. R. cited Ibid.

BUT an informer shall pay costs, where judgment is given against him, because the court in which he sues hath no jurisdiction; and though the judgment be not upon the merits.

As where an information was brought at the assizes against the defendant for non-residence, which being removed into the Court of *King's Bench* by *certiorari*, the defendant demurred for want of jurisdiction; and, upon argument, judgment was given for him. He then moved for costs upon the 18 *Eliz.* c. 5. and a case of *Cannon* and *Gooding* v. *Nixon*, *M.* 6 *G* 1. was cited, where upon an in- Garland, qui tam, v. Burton. B.R.M. 13G.2. 6Vin.Abr.341, 342. pl. 18. S. C. 2 Str. 1103. Vide 3 Term Rep. 364. H. Blackst. 546.

formation on the statute 1 and 2 P. and M. c. 7. for selling wares by retail, the defendant demurred, and, for want of joinder of demurrer on the part of the informers, had judgment and costs. On the contrary it was insisted, that this case was not within the statute, there having been no verdict, nor any judgment upon the merits. But the Court agreed, that it was clearly within the words and meaning of the statute, for judgment upon demurrer is certainly a judgment of law; and if informers should be allowed to bring informations in courts which have no jurisdiction, without the punishment of costs, great vexation would ensue, and the statute might, by such means, be wholly evaded. Whereupon a rule was made upon the prosecutor for the payment of costs.

2 Cro. Pract. 469. n.

And it is said the entry of a *noli prosequi* by the plaintiff, in a popular action, comes within the statute.

The 18 *Eliz.* extends to all actions by common informers, whether such actions may be grounded upon statutes made prior, or subsequent to that of Queen *Elizabeth*; which operates as a perpetual direction to all informers.

Hutt. 35.

Law, qui tam, v. Worral, B. R. M. 21 G. 2. 1 Wils. 177.

To an information on the statute of 8 *G.* 1. c. 19. for killing game, the defendant pleaded a conviction before a justice of the peace for the same fact, and had judgment for want of a replication; he afterwards obtained a side-bar rule for costs, which, on the part of the plaintiff, was moved to be set aside, on the ground that the 8 *G.* 1. did not give the defendant costs, and that the statute of 18 *Eliz.* did not extend

to subsequent statutes. *Sed per Curiam*,—The words of the 18 *Eliz.* c. 5. are as general as any statute relating to costs, and seem to extend to every informer upon any penal statute who shall delay his suit, discontinue, or be nonsuit, or shall have the matter pass against him by verdict or judgment. And there have been a great number of cases like the present, where costs have been given; and they cited *Carter*, qui tam, v. *Tooting*, *M.* 12 *G.* 1.

But no action, on any statute, by the party grieved, whether the statute give him the whole or part of the penalty, is within the purview of the 18 *Eliz.* c. 5. (1) the whole purport whereof seems clearly to relate only to common informers; and every person, prosecuting upon a penal statute, which giveth an action to him that will sue, is a common informer within the meaning of that statute. But though the party grieved, in an action upon a penal statute, is not liable to costs, under the 18 *Eliz.* c. 5, yet, if he would have been entitled to costs on a recovery, in such action, he shall, on a nonsuit or verdict against him, pay costs under the statute 4 *Jac.* 1. c. 3.

2 Leon. 116. 4 Leon. 55. Noy, 71. Cro. Eliz. 177. And. 116. pl. 162. Salk. 30. Sav. 50.

3 Burr. 1723. Vide ante, 18. 130.

A *qui tam* informer is liable to costs under the 18 *Eliz.* c. 5. as well as an informer suing for the whole penalty, upon a nonsuit in an action of debt on the 21 *H.* 8. for non-residence, though part of the penalty thereby inflicted for that offence, is limited to the king, who is, in no case, liable to costs.

(1) And it has been held that an action given by statute to the party grieved is not within 31 *Eliz.* c. 5. which limits the bringing of actions on penal statutes. *Spieres* v. *Frederick*, T. 25 G. 3. B. R. 2 Term Rep. 155. n. (a).

Wilkinson, qui tam, v. Allot, B. R. M. 16 G. 3. Cowp. 366.

THUS in debt upon the statute 21 *H.* 8. c. 13. for non-residence, the defendant pleaded the general issue, and, at the trial, the plaintiff was nonsuited. In support of a rule, which had been obtained to shew cause why the master should not be restrained from taxing the defendant his costs, it was insisted, that, as the plaintiff, if he had recovered, would not have been entitled to costs, it was neither legal, just, nor reciprocal, that, in the event of his having failed, he should pay costs to the defendant. That by 24 *H.* 8. c. 8. a defendant can have no costs on a nonsuit or verdict, where the plaintiff sues to the king's use, which was the case here; because half the penalty belongs to the king. That the statute 18 *Eliz.* c. 5. s. 3. did not extend to this case, but only to cases where the *whole* of the penalty belongs to the informer, or where he is the *party grieved*. 1 *And.* 116.

LORD MANSFIELD.—It is a certain principle that the king himself neither pays nor receives costs in any case. But this is not a suit prosecuted by the king, though he would have been entitled to a moiety of the penalty if it had been recovered: but it is the suit of a common informer. The statute 23 *H.* 8. c. 15. is out of the case; but that of 18 *Eliz.* c. 5. is decisive. In these *qui tam* actions, there is liberty given to the informer, by the same clause of the statute as provides for costs, to compound for the offence, with leave of the Court, which shews they are common informers. It is an exceeding plain case. I think the plaintiff ought to pay costs, and also the costs of this motion.

That a *qui tam* action is the suit of the party, and not that of the king. Vide Comb. 319. Salk. 30. 12 Mod. 74. 3 Lev. 398. Raym. 275. Hutt 82. Cro. Car. 10. Barnes, 48. 1 Blackst. 373. contra 1 Ld. Raym. 27.

ASTON, *Justice*, was of opinion that the rule ought to be discharged.

Ashurst, *Justice*,—The object of this statute was to prevent vexation in common informers; and, therefore, in that respect, there is no distinction between a common informer *qui tam*, and one who is entitled to the whole penalty; for he may be just as vexatious, when he prosecutes on behalf of the king and himself jointly, as when he sues on his own separate account.

Per Curiam. Rule discharged.

If the defendant obtain a verdict in a *qui tam* action of debt upon the 5 *Eliz*. c. 4. for exercising a trade contrary to that act of parliament, he is entitled to costs under the statute of 18 *Eliz*. c. 5. s. 3.

Pemple, qui tam, v. Tinsley, T. 7 G. 1. Cas. Pr. C. P. 22. S. P. Jeynes, qui tam, v. Stephenson, P. 10 G. 2. Barnes, 124.

And, if it appear upon the record, that the plaintiff is a common informer, the Court will not, after a verdict for the defendant, receive an affidavit, that the suit was really prosecuted for the benefit of another person, in order, thereby, to exempt the nominal plaintiff from costs under 18 *Eliz*. c. 5.

Thus, in debt *qui tam* against the defendant for exercising a trade in the corporation of *Ossulstry* contrary to the 5 *Eliz*. c. 4, a verdict being found for the defendant, and a rule made upon the plaintiff, the informer, for payment of costs to the defendant, a motion was made to discharge the rule, because, it was alleged, and an affidavit of the fact was offered to be produced, that this suit was commenced for the benefit of the corporation, and, therefore, the statute of 18 *Eliz*. c. 5. did not extend to this case; for the 6th *sect*.

Elde, qui tam, v. Stephens, H. 10 G. 1. B. R. 2 Ld. Raym. 1333.

provides that that act shall not restrain any certain person, body politic or corporate, to whom or to whose use any forfeiture, penalty, &c. is, or shall be specially limited or granted by virtue of any statute, &c. And by 5 *Eliz.* c. 4. s. 45. all forfeitures for exercising trades in a corporation, contrary to that statute, are given to the use of the corporation. Therefore, this was not a case within the 18 *Eliz.* c. 5, because that statute extends only to common informers. But it was resolved, unanimously, that the Court could not receive any information of this matter by affidavit, nor take notice of any thing, but what appeared on the face of the record; and, therefore, could look upon the plaintiff only as a common informer, and, consequently, he ought to pay costs (1). Motion denied.

AND where the defendant obtains a verdict in a *qui tam* information, he shall have costs, although he himself removed the information from the sessions into the Court of *King's Bench*.

Qui tam by the Town of Dover v. Hodgson, B. R. T. 19 and 20 G. 2. 1 Wils. 139.

ACCORDINGLY, the defendant having obtained a verdict upon an information against him for following a trade contrary to the 5 *Eliz.* c. 4, and obtained a side-bar rule for costs, a motion was made to set the rule for costs aside, because, as the defendant himself had removed the information

(1) To the report of this case, a *quære* is subjoined by the reporter, whether the penalty for exercising a trade in a corporation contrary to the 5 *Eliz.* c. 4. is given by the 45 sect. of that statute to the corporation; and, if it is, whether a common informer can sue for it? And Hob. 189. Moore, 886. pl. 1245, are cited. Vide also, as to the last point, 1 Wils. 233.

from the sessions, it was insisted he was not entitled to costs; but the Court seemed to think there could be no doubt but that the defendant must have his costs under the statute 18 *Eliz.* c. 5. but ordered precedents to be searched for in the Crown-office.

In a *qui tam* action of debt, the jury, at the trial, found not only the penalty inflicted by the statute, on which the action was grounded, but likewise damages for it's detention, besides costs and charges; and, in pursuance of such finding, judgment was entered up for the debt, and also for damages and costs *de incremento*; on error brought, it was objected, that a common informer can have no damages for the detention of a debt, which does not accrue till the judgment, nor, consequently, costs of increase which being founded upon, must follow, such damages, and the judgment is entire, and must be reversed *in toto*; but the Court affirmed so much of the judgment as related to the recovery of the *debt*, and reversed it as to the *damages and costs*. In this case there were distinct judgments upon the record; the first for the debt, and the latter, beginning with —"It is *also* considered," &c. for the damages and costs.

Frederick, Bart. v. Lookup, qui tam. In Error, B. R. H. 7 G. 3. 4 Burr. 2018.

Vide 1 Stra. 188. 2 Stra. 807. acc.

In another case, which was an action of debt, brought, in the Court of *Common Pleas*, upon the bribery act, 2 *G.* 2. c. 24. s. 7, upon the trial, a verdict was given for the plaintiff, for 1000*l.* and 1 *s.* damages, besides his costs and charges; and so much for his costs and charges. Judgment was entered accordingly, and for costs *de incremento*, so much; amounting in the whole to so much.

Cuming v. Sibly, B. R. M. 10 G. 3. 4 Burr. 2489.

UPON error brought by the defendant below, a similar objection was taken as in *Frederick* v. *Lookup*, that the plaintiff in a popular action was not entitled to damages, and, consequently, the judgment ought to be reversed both as to the 1 *s.* damages and the *costs*, because the costs are *incorporated* with the damages.

LORD MANSFIELD, said, there were no damages to be given in these popular actions. This statute gives *costs*, (*a*) indeed; but here the damages and costs are blended together.

(*a*) The 2 G. 2. c. 24. s. 7. inflicts a penalty of 500 *l.* for the offences enumerated in that section, to be recovered with full costs of suit.

YATES, *Justice*.—The plaintiff has no right to the debt, till after conviction. Therefore he can have no right to damages for the detention of it. And as the costs and damages are incorporated; the judgment must be reversed as to both damages and costs.

ACCORDINGLY, the Court reversed the judgment, as to the *damages and costs*, and affirmed it as to the *debt*.

SECT. III.

Of Costs where a Plaintiff sues in Formâ Pauperis.

THE 11 *H.* 7. c. 12. *in the behalf of the poor persons of this land, not able to sue for their remedy after the course of the common law*; enacts, "That every poor person or "persons which have or hereafter shall have cause of action

Every poor person having cause of action, shall

"against any person within this realm, shall have by the "discretion of the Chancellor of this realm, for the time be- "ing, writ or writs original, and *subpœnas*, according to the "nature of their causes, therefore nothing paying to your "Highness for the seals of the same, nor to any person for "the writing of the said writs to be hereafter sued; and that "the said Chancellor shall assign clerks to write the same "writs ready to be sealed; and also learned counsel and at- "tornies for the same, without any reward taken therefore: "and if the said writ or writs be returned before the king in "his bench, the justices there shall assign to the same poor "person or persons, counsel learned, by their discretions, "which shall give their counsels, nothing taking for the "same; and the justices shall likewise appoint attorney for "such poor person or persons, and all other officers requisite "and necessary to be had for the speed of the said suits, "which shall do their duties without any reward for their "counsels, help, and business in the same; and the same "law shall be observed of all such suits to be made before "the king's justices of his Common place, and barons of "his Exchequer, and all other justices in the courts of re- "cord where any such suit shall be."

have original writs, counsel, attorney, &c. without fee, or reward.

The 23 *H.* 8. c. 15. s. 2. enacts, "That every poor per- "son, being plaintiff in any of the actions, bills, or plaints "hereinbefore mentioned, (*a*) which, at the commencement "of his action, is admitted by discretion of the judge or "judges, where such action shall be pursued, to have their "process and counsel of charity, without any money or fee "paying for the same, shall not be compelled to pay any

A plaintiff suing in forma pauperis, shall not pay costs, but be otherwise punished at the discretion of the Court.
(*a*) Vide ante, 124.

"costs, by virtue and force of this statute; but shall suffer "other punishment as by the discretion of the justices or "judge, afore whom such suits shall depend, shall be thought "reasonable."

WHAT degree of poverty shall entitle a person to sue *in formâ pauperis*, is not accurately defined by the statute of 11 *H.* 7, but the courts have been long in the habit of granting this privilege to such persons, having cause of action, as will swear that they are not worth 5 *l.* (*a*) in the world, exclusive of their wearing apparel, and the right to the matter in controversy.

3 Com. Dig. 388.
Imp. Pr. K. B. 3. Ed. 496.
Imp. Pr. C. P. 2. Ed. 566.
(*a*) 10 *l.* according to 1 Lill. Pract. Reg. 851.

THE effect of such admission is an exemption from the payment of any fees to the officers of the Court, between the commencement of the suit and the trial, but if, in such case, the plaintiff obtain a verdict with damages above 5 *l.* the officers will take of him the court fees, in which are included those of passing the record.

Imp. Pr. K. B. and C. P. ubi supra.

THOUGH the statute 23 *H.* 8. c. 15. expressly declares that a plaintiff admitted *in formâ pauperis*, shall not be subject to any costs, upon a nonsuit or verdict against him, but suffer such other punishment as the Court, in their discretion, shall think proper to inflict, yet it was the practice formerly, where a pauper was nonsuited, to tax the costs, and to give him the option of discharging them, or submitting to be whipped; but it was in the discretion of the Court to dispense with both, upon consideration of the circumstances of the case. The same doctrine was laid down in one case, by

Munford v. Pait, B. R. T. 17 Car. 2. 1 Keb. 913. S.C. 1 Sid. 261.

Lord *Chief Justice* HOLT; however, afterwards, his Lordship altered his opinion, and denied a motion by *Salkeld* that a pauper might be whipped for the non-payment of costs upon a nonsuit, observing, at the same time, that there was no officer for the purpose, and that he had never known it done. Salk. 306. Ibid.

WHERE a plaintiff makes the privilege of suing *in formâ pauperis* subservient to vexatious purposes, the Court will dispauper him, and stay his proceedings, till he find security for costs.

THUS, in an action of trespass and ejectment, on a motion to dispauper the plaintiff, it appeared that this was the fourth action, which he had instituted for the same premises, that he had been nonsuited in the three former actions, and had never paid any costs, neither would he make a sufficient lessee for that purpose, and had also sealed a general release to the defendant; and by ROLLE, *Chief Justice*, let the plaintiff be dispaupered, and let him appoint an able lessee to pay the costs, or otherwise he shall not proceed in this action. Anon. B. R. T. 1653. Sty. 386.

AGAIN, in 7 *Mod.* 114. *B. R. M.* 1 *Ann.* it is laid down, that if a pauper be nonsuit, there shall be costs taxed, and he shall not, afterwards, proceed without paying the costs, or shewing, according to the act of parliament, that he was whipped.

BUT the Court rejected a motion to stay proceedings in a second action, until the costs of a nonsuit, in a former action, Winter v. Slow, B. R. M. 4 G. 2. 2 Stra. 878.

between the same parties for the same cause, were paid, because it appeared that the nonsuit was not upon the merits, but occasioned by a mistake of the plaintiff's attorney, and, therefore, in the opinion of the Court not vexatious. The plaintiff, in both actions, sued *in formâ pauperis*.

According to Barnard. K. B. 375. S. C. it was a motion to *dispauper* the plaintiff, because he had been nonsuited in a former action; but the Court, for the reason in *Strange*, refused the motion.

Anon. B. R. M. 4 G. 2. Fitzgib. 161.

In another case, a pauper having been nonsuited, and having proceeded in a new action for the same cause, it was moved to stay the proceedings in the latter action, until the pauper should pay the costs of the former; *sed per Curiam*, the course is to dispauper him.

Goodtitle v. Mayo, B. R. H. 29 G. 3.

And where a person, after having failed in one action, in which he sued *in formâ pauperis*, commences a second action for the same cause, but not in the character of a pauper, the Court will not stay the proceedings in the latter action, until the costs of the first have been paid;—because he is not liable to such costs; and he proceeds in the second action, as an ordinary plaintiff, at the peril of costs.

But if a plaintiff, after a nonsuit in an action, in which he did not sue as a pauper, commence a second action for the same cause, *in formâ pauperis*, the Court will stay the proceedings in the latter action, till the costs of the nonsuit are paid.

Weston v. Withers, B. R. P. 28 G. 3. 2 T. R. 511.

Thus the plaintiff being nonsuited in a former action of trespass against the defendant for taking his goods as a distress for rent, brought this second action for the same cause,

and sued *in formâ pauperis*, being a prisoner in the King's Bench. The costs of the former action amounted to 32 *l.* which the defendant swore he could not levy, the plaintiff not having any goods.

A RULE, which had been obtained to shew cause why the proceedings in the second action should not be stayed, until the costs of the former were paid, was opposed, on the ground that this rule never held but in ejectments.

BUT the Court made the rule absolute.

IF a plaintiff suing *in formâ pauperis*, be nonsuited, and, afterwards, bring another action, and recover, the Court will not order the costs of the first action to be deducted out of the recovery in the second. Butler v. Inneys, B. R. H. 4 G. 2. 2 Stra. 891.

WHERE the plaintiff, at the time of a nonsuit, was a pauper, the descent of lands to him afterwards, shall not have relation back, so as to make him liable to the costs of the nonsuit. Ancell v. Slowman, B. R. H. 11 G. 1. 8 Mod. 344.

THE consenting to a trial at bar, on the condition of paying only *nisi prius* costs, does not preclude the plaintiff from being admitted to sue *in formâ pauperis*, at any subsequent stage of the suit, nor from the benefit of such admission, *viz.* an entire exemption from costs, should a verdict be given against him; and, in such case, the Court will not, on his commencing another action for the same cause, dispauper him, unless his proceedings appear to be vexatious.

Britton on Dem. Webb v. Greenville, B. R. M. 13 G. 2. 16 Vin. Abr. 262. pl. 15. S.C. 2 Str. 1121.

THE case was as follows; in ejectment after issue joined the defendant moved for a trial at bar, which the plaintiff at first opposed, but afterwards consented to upon condition, that in case of a nonsuit or verdict against him, he should pay such costs only, as were usually allowed at *Nisi Prius*. Subsequent to this rule, the lessor of the plaintiff was admitted *in formâ pauperis*, and, at the trial at bar, the jury found a verdict for the defendant. The plaintiff having brought a new ejectment, it was moved that it should be referred to the master to tax the costs of the first action, according to the plaintiff's agreement, which, as was alleged, it was not in his power to wave by, afterwards, procuring himself to be admitted *in formâ pauperis*, and that the bringing of a new ejectment, after a trial at bar, was vexatious.

BUT *the Court* held that the plaintiff's agreement could not preclude him from the benefit of a subsequent admission *in formâ pauperis*, for it means only, that if *any* costs be adjudged due, then he should pay no more than *Nisi Prius* costs, and not that he should pay costs at all events. Now the only instance in which a pauper shall pay costs, is where he has been vexatious, and then the usual way is to dispauper him, but there is no vexation in the present case. Rule, for taxing costs, discharged.

Salk. 506.

IT seems that a plaintiff, admitted to sue *in formâ pauperis* is not liable to costs for not proceeding to trial pursuant to his notice; but the method in such case, is to move to dispauper him.

INDEED the contrary is laid down in one case, where on a motion for costs against a pauper for not proceeding to trial, the Court, on debate, ordered the costs to be taxed, and declared that a pauper should pay costs for all defaults. Walker v. Packer, T. 2 G. 2. Cas. Pr. C. P. 47. S.C. Differently Rep. Pract. Reg. 405.

BUT in *Nokes* v. *Watts*, the Court of *King's Bench*, said that they concurred with the *Common Pleas*, where it was settled, that a pauper should not pay costs for not going on to trial, as other plaintiffs did. But if the costs were taxed, they would prevent his being vexatious, by obliging him to pay them, before he should try the cause. In *Fort.* 319, the Court say, that they cannot give costs against a pauper for not going to trial, because it is against the express words of the act of parliament, and would be to imprison him for life; but that if he be vexatious, a motion may be made to dispauper him. B. R. P. 7 G. 1. 1 Str. 420. S. C. Fort. 319.

AND consistent with the latter part of this report is the language of the Court, in a later case; where a motion was made on the authority of *Nokes* v. *Watts*, as reported in *Strange*, that the plaintiff, who was a pauper, might be restrained from proceeding to trial, till he had paid the costs of former notices; but the Court thought the case cited did not put the matter upon a proper footing, and that it was absurd to make any rule about costs whilst the admission stood; and therefore made a rule for the plaintiff to shew cause why he should not be dispaupered; which was, afterwards, on an affidavit of service, made absolute. Taylor v. Lowe, B. R. T. 7 G. 2. 2 Str. 983. S. C. cit. acc. by Wilmot, Ch. J. 3 Wils. 24.

A PLAINTIFF may be admitted *in formâ pauperis*, at any Langley v. Blackerby, H. 12 G. 2.

Andr. 306. B. R. H. 254. acc. Oats v. Holiday, B. R. Trin. 22 and 23 G. 2. 3 Wils. 24.

time after, as well as at the commencement of the suit; and a person admitted *in formâ pauperis pendente lite*, shall not pay costs from the beginning of the action (1).

Dub. Anon. M. 12 Jac. 1. 1 Ro. Rep. 88.

A PERSON admitted *in formâ pauperis*, at the commencement of the action, shall not, though he be discharged thereof before issue joined, pay any costs upon his being nonsuited.

Sloman v. Aynell, B. R. H. 11 G. 1. Fort. 320.

AGAIN, the plaintiff, who was admitted *in formâ pauperis*, being taken in execution for the costs of a nonsuit, was, on motion discharged by the Court, though it was urged, that he was dispaupered; for being once admitted, he ought to pay no costs.

IN *Blood* v. *Lee*, the question was, whether a person admitted *in formâ pauperis* was liable to costs upon judgment, as in case of a nonsuit, the plaintiff having been admitted to sue in that mode, after he had received notice of the motion for such judgment? the point was not decided, but upon principle, and the reasoning in some of the cases abovementioned, which were cited by Lord *Chief Justice* WILMOT, it should seem that the plaintiff ought not, in such case, to pay any costs.

Blood v. Lee, C.B.M.10G.3. 3 Wils. 24.

THIS was an action upon the case upon *assumpsit*, commenced in the *Palace Court*, for about the sum of 9*l.* which

(1) But by order in the *Exchequer*, 1717, if admitted after the commencement of the suit, the *pauper* is to give security to pay the costs before admittance. Cited 3 Com. Dig. 389.

the defendant removed into this court by *habeas corpus*. The cause being at issue, and the plaintiff not having proceeded to trial in due time after issue joined, the defendant gave him notice of motion for judgment, as in case of a nonsuit; before the motion came on, the plaintiff applied to be admitted, and was admitted, to proceed in his suit *in formâ pauperis*. Afterwards upon shewing cause, the rule for judgment, as in case of a nonsuit, was made absolute, because neither the plaintiff nor his attorney would undertake to pay the costs of that application to the Court. The plaintiff being taken in execution upon this judgment, a motion was made for his discharge, on the ground that, as he was admitted *in formâ pauperis*, he was not liable to any costs. A rule was granted to shew cause.

At another day, before cause was shewn, Lord *Chief Justice* Wilmot cited, from his own manuscript notes, the cases of *Winter* v. *Slow*, *Taylor* v. *Lowe*, and *Oats*, v. *Holiday*. After stating these cases at length, his lordship observed that that of *Oats* v. *Holiday* seemed to be in favour of the motion, to discharge the plaintiff out of custody; but the matter was adjourned.

Although amendments are usually granted upon payment of costs, yet in the case of *Rex* v. *Charlesworth*, an information for forging a warrant of attorney, to acknowledge satisfaction upon a judgment, was amended, *without* costs, (the prosecutor having been admitted a pauper), and without giving the defendant leave to plead *de novo*.

Rex v. Charlesworth, B. R. T. 4 G. 2. 2 Str. 871.

3 Bl. Comm. 400, 401.

IT seems however agreed, that a pauper may recover costs, though he pays none; for the counsel and clerks are bound to give their labour to *him*, but not to his antagonists.

Scatchmer v. Foulkard, P. 1701.

IN support of this doctrine, Mr. *Justice* BLACKSTONE cites 1 *Eq. Cas. Abr.* 125. where, a plea and demurrer, put in to a bill which the plaintiff had brought *in formâ pauperis*, being over-ruled, Lord SOMERS, for the reason contained in the above passage, after long debate, and inquiry of all the ancient counsel and clerks, ordered the plaintiff his costs, *like other suitors*.

Angell v. Smith, P. 1703. In Canc. Prec. Chanc. 219.

BUT in a later case, where the plaintiff, suing *in formâ pauperis*, obtained a decree to recover with costs, and the master taxed the costs as usual for persons not paupers, on motion, Lord *Keeper* WRIGHT said, it was unreasonable that any one should have more costs than he was out of pocket, and ordered the plaintiff and his solicitor to make oath before the master, and what they swore they had paid, or were to pay, was to be allowed, but no further.

Anon. P. 8 G. 2. Barnes, 328. Ruled acc. in

A DEFENDANT in a *civil* action, (1) cannot be admitted

(1) But a person may be admitted to defend an indictment *in formâ pauperis*; because the prosecutor not being entitled to costs in criminal proceedings, he cannot be prejudiced by such admission, which is in effect nothing more than ordering the officers of the court to take no fees, and, therefore, in these prosecutions the judges have a discretionary power, at the common law, of admitting or refusing liberty to defend as a pauper. *Rex* v. *Wright*, B. R. P. 9 G. 2. B. R. H. 211. 253. S. C. 2 Str. 1041. 6 *Mod.* 88. acc.—And by statute 2 G. 2. c. 28. s. 8. A person, arrested on a *capias* or information, relating to the customs, upon making affidavit before a judge, or commissioner em-

to defend *in formâ pauperis*; because no person can be admitted either to sue or defend as a pauper, but under some act of parliament, and the statutes of 11 *H.* 7. and 23 *H.* 8. contain no provisions on behalf of defendants, but merely enable plaintiffs to sue in that form. And if the courts had a discretionary power, without the direction of a statute, to admit persons, in civil suits to proceed *in formâ pauperis*, they would in effect possess a power of dispensing, in many instances, with the operation of the statutes relative to costs.

a late case, by Mr. Justice *Gould*, Imp. Pr. C. B. 2 Ed. 567. 2 Keb. 378. pl. 40. Semb. acc. Sed vide Comb. 77. 11 Mod. 84. Pract. Reg. C. P. 405, 6. Semb. contra.

powered to take affidavits, that he is not worth 5*l.* exclusive of his wearing apparel, and upon petition to the Court, may, at the discretion of the judges of such Court, be admitted to defend such action or information *in formâ pauperis*, in like manner, and with the same privileges, as other poor subjects are permitted to sue for the recovery of their rights.—A person admitted *in formâ pauperis* ought not to have a new trial granted him, because he has had the benefit of the king's justice once, and must acquiesce in it. *Per* North, 1 *Mod.* 268.—Nor ought he to be allowed to remove a cause out of an inferior court. *Per* North, *ibid.*—A person convicted of perjury, and outlawed for forgery, was admitted to plead the king's pardon *in formâ pauperis*. *Rex* v. *Morgan*, *M.* 18 *G.* 2. 2 *Str.* 1215.—An admission to sue *in formâ pauperis* in the Court of Chancery, is not binding upon the officers of the Court of King's Bench, therefore on an issue out of Chancery, to be tried in B.R. there must be a new admission in the latter court. *Gibson* v. *M'Carty*, *T.* 9 *G.* 2. *per* Lord Hardwicke, *Ch. J.* at *Nisi Prius*. *B. R. H.* 311.—And a person admitted *in formâ pauperis*, can only sue in that cause for which he is admitted, so that if any other cause arises, he must be admitted *de novo*, *et sic toties quoties*. 1 *Lill. Pract. Reg.* 851.—The Court will not admit a defendant removing an indictment from *Hicks's Hall* by *certiorari* into B. R. without good cause, to defend *in formâ pauperis*. But, perhaps, it might be otherwise if the *certiorari* should be necessary, as for the purpose of obtaining an impartial trial. *The King* v. *Reynolds*, *T.* 33 and 34 *G.* 2. *B. R.* 1 *Bl.* 230.—Nor will they admit a person to defend *in formâ pauperis* upon an attachment for a contempt. *Rex* v. *Pearson*, *B. R. T.* 33 and 34 *G.* 2. 2 *Burr.* 1039.—A prosecutor of an indictment is not admitted to prosecute *in formâ pauperis*, unless some special ground be laid for the motion, nor a plaintiff in a civil suit, unless counsel certify that there is some foundation for his suing. *Rex* v. *Clarke*, *B. R. H.* 2 *G.* 3. 3 *Burr.* 1308. Vide further, as to the mode of being admitted, and suing *in formâ pauperis*. 16 *Vin. Abr.* 259, *&c.* 1 *Lill. Pr. Reg.* 851. *Imp. Pr. K. B.* 3 *Ed.* 494. *Imp. Pr. C. B.* 2 *Ed.* 564.

SECT. IV.

Of Costs in Actions by, or against, Infants.

Co. Litt. 135. b. 2 Inst. 261. F. N. B. 27. Vide Hargr. Co. Litt. 135. b. n. (1). 1 Bl. Com. 464. 2 Saund. 212. 1 Vent. 102. 1 Mod. 47. 72. 296. 1 Bl. Com. ubi supra. 2 Str. 783. Fitzgib. 1.

IT is said by Lord COKE, and also by FITZHERBERT, that an infant, or person under the age of twenty-one years, *must* sue by *prochein amy*, or next friend; but it should seem that he has it in his election to sue either in that way, or by guardian. And where an infant sues as co-executor with others, it has been adjudged that the other executors of full age may constitute an attorney for the infant as well as themselves, making together but one representative. An infant *defendant* must, in every case, appear and defend by *guardian*, even though he should be sued as co-executor with others of full age.

Grave v. Grave B. R. T. 26 Eliz. Cro. Eliz. 33. Vide 1 Bulstr. 189.

AN infant, by his guardian, brought an action of trespass, and was nonsuited, and it was resolved that he should pay no costs. But long subsequent to this decision, it appears to have been doubted, whether an infant plaintiff was personally liable to costs, in case he was nonsuited, or the defendant obtained a verdict.

Turner v. Turner. In Canc. 14th May, 1726. 2 P. Wms. 297. S. C. 1 Str. 708. 2 Eq. Cas. Abr. 238.

AN infant who by the custom of gavel-kind was one of three co-heirs of a real estate, by his *prochein amy* brought his bill to establish a will whereby that estate was pretended to be devised to him only.

THE Court of Chancery directed an issue, which was found afterwards against the plaintiff. The *procbein amy* died before the costs taxed, and the infant came of age, but never, afterwards, proceeded further in the suit; and the cause was now set down purely upon the costs reserved.

Lord Chancellor KING.—At law the infant is liable to pay the costs, if the judgment be against him; as if an infant brings an action of battery and has a verdict against him, he must pay the costs; and if the common law be so, why should it not be so in equity? otherwise an infant would be left at liberty to plague mankind as he thinks fit.

AND the Court being informed by the register and clerk in Court, that the course was to dismiss the infant's bill generally with costs, without mentioning who should pay them, his lordship said he would dismiss this bill with costs; and (as he apprehended) upon a general dismission the defendant had his election whether he would sue the infant or *procbein amy* for such costs. Sed vide 1 Str. 710.

BUT, afterwards, on a rehearing, his lordship, after observing, that no case had been cited where an infant plaintiff had been obliged to pay costs either at law, or in equity, dismissed the bill *without* costs. 1 Str. 708.

BUT though an infant plaintiff, where he fails in his action, is not personally liable to costs, a defendant is not, in such case, without his remedy, for by the uniform practice of all the courts in *Westminster-Hall*, the *procbein amy*, or Slaughter v. Talbot, C. P. M. 13 G. 2.

Barnes, 128. S. C. Pract. Reg. C.P.102. Adm. 1 Wils. 130.

guardian of such plaintiff is considered to undertake the conduct or management of the suit, at his own personal risk with regard to costs. This point is fully established.

James v. Hatfield, 1Str.548.

In an action by an infant, Lord *Chief Justice* King, at *Nisi Prius*, permitted the guardian's declaration to be given in evidence on behalf of the *defendant*, he being a person liable to costs. And for the same reason, in an action of assault and battery by an infant by her father, as *procbein amy*, the father was refused to be a witness for the plaintiff, by Lord Hardwicke, at *Nisi Prius*, in *Middlesex*.

Hopkins v. Neal, 2 Str. 1026. Vide 1 Str.506. 708. Acc. *per* Chapple, J. in Milward v. Sterling, B. R. M. 1738. 12 Vin. Abr. 8. pl. 21.

Englefield v. Round, C. P. H. 13 G. 1. Co. G. 32. Roper v. Harrison, M. 10 G. 2. Ibid.

So if an infant, suing by *procbein amy*, do not proceed to trial pursuant to notice, or become nonsuited, such *procbein amy* is liable to costs.

Slaughter v. Talbot, supra.

And if the *procbein amy*, or guardian, refuse to pay the costs, upon demand, the Court will, on motion, grant an attachment against him.

Morgan v. Crompton. In Scacc. Dec. 5th, 1733. Bunb. 332.

But it has been adjudged that, if the bill of an infant, suing by *procbein amy*, be dismissed for want of prosecution, and the infant die before the taxation of costs, the *procbein amy* is not liable, but the costs will be lost.

Gardiner v. Holt, B. R. M. 18 G. 2. 2 Str. 1217.

The defendant having obtained a verdict in an action by an infant, took the plaintiff in execution for the costs, and the Court refused to discharge him on motion, saying, that if

costs could not be given, judgment for them would be matter of error to be insisted on.

THE lessor of the plaintiff, in an action of ejectment was an infant, his lessee was nonsuited, and 50 *l.* costs were given to the defendant. The infant's father, who prosecuted the suit, being dead, the Court made a rule that the lessor should pay the costs; yet, says the book, it was doubted in this case, because of his infancy. But, if the father had been alive, the Court would have made him pay the costs, or, if he had left assets, his executor. The question was adjourned. Anon. B. R. 1 Freem. 378.

THE Court, upon motion on the part of the defendant in ejectment, made a rule to stay proceedings until the lessor of the plaintiff, who was an infant, had got somebody to enter into a rule to pay defendant his costs, if there should be a verdict for him. But in a subsequent case, where it appeared, upon shewing cause against a rule for staying the proceedings in an ejectment till a sufficient plaintiff was found, the lessor of the plaintiff being an infant, that no application had been made to know if there was a real and substantial plaintiff, and, as was stated by affidavit, that the guardian had undertaken to pay the costs, if the suit should be determined against the infant, the Court discharged the rule with costs. Anon. B.R.P. 19 G. 2. 1 Wils. 130. Anon. B. R. T. 14 G. 3. Cowp. 128.

WHEN an infant sues, the Court will oblige the *prochein amy*, or guardian, or attorney to give security for the costs; and where the *prochein amy*, or guardian, appears to be in low circumstances, or incompetent to discharge such costs, 1 T. R. 491.

as he may be eventually liable to, it is said, the Court will, on motion, appoint a new *prochein amy*, or guardian of sufficient ability.

1 Str. 708.

2 Str. 1217.

An infant *defendant* is liable to costs, in the same manner as any other defendant.

SECT. V.

Of Costs in Actions against Justices of the Peace, &c. for something done by Virtue of their Offices.

The 43 *Eliz.* c. 2. s. 19. (entitled, *an act for the relief of the poor*) enacts, "That if any action of trespass or other "suit shall be brought against any person, for taking of any "distress, making of any sale, or any other thing doing, by "authority of this act, the defendant in such action shall and "may either plead not guilty, or otherwise make avowry, "cognizance, or justification generally that the distress, sale, "trespass, or other thing complained of, was done by authority of this act; to which the plaintiff shall be admitted to "reply that the defendant did take the said distress, &c. "of his own wrong without any such cause, &c. whereupon "the issue in every such action shall be joined; and if there "shall be a verdict for the defendant, or a nonsuit of the "plaintiff after appearance, the same defendant shall recover "treble damages, by reason of his wrongful vexation in that "behalf, with his costs also in that part sustained, and that "to be assessed by the same jury, or writ to inquire of the "damages, as the same shall require."

The defendant may plead general issue, or avow, &c. generally in a suit commenced against him, for any thing done under this statute.

And on a verdict for him, or a nonsuit, shall have treble damages, and costs.

7 *Jac.* 1. c. 5. (made perpetual by 21 *Jac.* 1. c. 12. s. 2.) enacts, "That if any action, bill, plaint, or suit, upon the "case, trespass, battery, or false imprisonment, shall be "brought, in any of his majesty's courts at *Westminster*, "or elsewhere, against any justice of peace, mayor, or "bailiff of city or town corporate, headborough, port-reve, "constable, tythingman, collector of subsidy or fifteens, for "or concerning any matter, cause, or thing, by them or any "of them done by virtue or reason of their or any of their "office or offices, it shall be lawful to and for every such "justice of peace, or other officer or officers before named, "and all others which in their aid or assistance, or by their "commandment, shall do any thing touching or concerning "his or their office or offices, to plead the general issue, that "he or they are not guilty, and to give such special matter "in evidence to the jury which shall try the same, which "special matter being pleaded, had been a good and suf-"ficient matter in law to have discharged the said defendant "or defendants of the trespass, or other matter laid to his or "their charge; and that if the verdict shall pass with the said "defendant or defendants in any such action, or the plaintiff or "plaintiffs therein become nonsuit, or suffer any discontinuance thereof, the justice or justices, or such other judge before whom the said matter shall be tried, shall by force and "virtue of this act allow unto the defendant or defendants "his or their *double* costs, which he or they shall have sustained by reason of their wrongful vexation in defence of "the said action or suit; for which the said defendant or defendants shall have like remedy, as in other cases where "costs by the laws of this realm are given to defendants."

Justice of the peace, &c. impleaded for any thing done by virtue of his office, may plead the general issue, and give special matter in evidence.

And if a verdict pass for the defendant, or the plaintiff be nonsuited, or discontinue, the defendant shall have double costs.

21 *Jac.* 1. c. 12. s. 3. (after reciting that the 7 *Jac.* 1. c. 5. had been found to be a good and profitable law, and making the same perpetual) enacts, "That all churchwardens, and all persons called swornmen, executing of "the office of churchwardens, and all overseers of the poor, "and all others, which in their aid and assistance, or by "their commandment, shall do any thing touching or concerning his or their office or offices, shall hereafter be enabled to receive and have such benefit and help by virtue "of the said act, to all intents, constructions, and purposes, "as if they had been specially named therein."

Churchwardens and overseers comprehended within 7 Jac. 1. c. 5.

21 *Jac.* 1. c. 12. s. 5. "If any action, bill, plaint, or suit, "upon the case, trespass, battery, or false imprisonment, "shall be brought against any justice of peace, mayor, or "bailiff of city, or town corporate, headborough, port-reve, "constable, tythingman, collector of subsidy or fifteens, "churchwardens, and persons called swornmen, executing "the office of churchwarden or overseer of the poor, and "their deputies, or any of them, or any other which in their "aid and assistance, or by their commandment, shall do any "thing touching or concerning his or their office or offices, "for or concerning any matter, cause, or thing, by them, or "any of them, done by virtue or reason of their or any of "their office or offices, that the said action, &c. shall be laid "within the county where the trespass or fact shall be done "and committed, and not elsewhere; and that all and every "person and persons aforesaid, may plead thereunto the general issue, and give the special matter in evidence, as in "and by the said former act is limited or declared; and

An action brought against an officer shall be laid in the county where the fact was committed.

"that if upon the trial of any such action, &c. the plaintiff "or plaintiffs therein shall not prove to the jury, which shall "try the same, that the trespass, battery, imprisonment, "or other fact or cause of his, her, or their such action, "&c. was or were had, made, committed, or done, within "the county, wherein such action, &c. shall be laid; that "then, in every such case, the jury shall find the defendant "and defendants in every such action, &c. not guilty, with- "out having any regard or respect to any evidence given by "the plaintiff or plaintiffs therein, touching the trespass, "battery, imprisonment, or other cause for which the same "action, &c. is or shall be brought: and if the verdict shall "pass with the defendant or defendants in any such action, "&c. or the plaintiff or plaintiffs therein become nonsuit, or "suffer any discontinuance thereof, that, in every such case, "the defendant or defendants shall have such *double* costs, "and all other advantages and remedies, as in and by the "said former act is limited, directed, or provided."

If not so laid the jury shall find the defendant not guilty, and he shall have double costs.

By the 24 *Geo.* 2. c. 44. s. 1. no writ shall be sued out against, nor any copy of process served on, any justice of the peace for any thing done in the execution of his office, till notice in writing of such intended writ, or process shall have been delivered to him, or left at the usual place of his abode, at least one calendar month before the suing out, or serving the same; in which notice shall be clearly and explicitly contained the cause of action which the party suing out the process claimeth to have against such justice of the peace, and on the back thereof shall be endorsed the name of the party's agent or attorney, with the place of his abode.

Justice of peace, within one month after receiving notice of action, may tender amends, and plead same in bar;

By 30 Geo. 2. c. 24. s. 23. this clause is extended to justices acting under that act.

And if the amends shall be found sufficient, defendant shall have a verdict, and same costs as if he had pleaded the general issue.

24 *Geo.* 2. c. 44. s. 2. enacts—"That it shall be lawful for "such justice of the peace, at any time, within one calendar "month after such notice given as aforesaid, to tender amends "to the party complaining, or to his or her agent or attorney, "and in case the same is not accepted, to plead such tender in "bar to any action to be brought against him, grounded on "such writ or process, together with the plea of not guilty, and "any other plea, with leave of the Court; and if upon issue "joined thereon, the jury shall find the amends so tendered "to have been sufficient, then they shall give a verdict for "the defendant; and in such case, or in case the plaintiff "shall become nonsuit, or shall discontinue his or her action, "or in case judgment shall be given for such defendant or "defendants upon demurrer, such justice shall be entitled *to* "*the like costs* as he would have been entitled unto, in case "he had pleaded the *general issue only*; and if upon issue "so joined, the jury shall find that no amends were tendered, "or that the same were not sufficient, and also against the "defendant or defendants on such other plea or pleas, then "they shall give a verdict for the plaintiff, and such da-"mages as they shall think proper, which he or she shall re-"cover with his or her costs of suit."

In default of the plaintiff's proving notice, defendant to have a verdict and costs.

By 24 *Geo.* 2. c. 44. s. 3. it is further enacted, "That no "such plaintiff shall recover any verdict against such justice "in any case where the action shall be grounded on any act "of the defendant, as justice of the peace, unless it is proved "upon the trial of such action, that such notice was given "as aforesaid; but in default thereof, such justice shall re-"cover a verdict and costs as aforesaid."

24 *Geo.* 2. c. 44. s. 6. further enacts, "That no action "shall be brought against any constable, headborough, or "other officer, or against any person or persons acting by his "order and in his aid, for any thing done in obedience to "any warrant under the hand or seal of any justice of the "peace, until demand hath been made or left at the usual "place of his abode, by the party or parties intending to "bring such action, or by his, her, or their attorney or "agent, in writing, signed by the party demanding the same, "of the perusal and copy of such warrant, and the same "hath been refused or neglected for the space of six days "after such demand; and in case after such demand and "compliance therewith, by shewing the said warrant to, and "permitting a copy to be taken thereof by the party de- "manding the same, any action shall be brought against "such constable, headborough, or other officer, or against "such person or persons acting in his aid for any such cause "as aforesaid, without making the justice or justices who "signed or sealed the said warrant, defendant or defendants, "that on producing and proving such warrant at the trial of "such action, the jury shall give their verdict for the de- "fendant or defendants, notwithstanding any defect of juris- "diction in such justice or justices; and if such action be "brought jointly against such justice or justices, and also "against such constable, headborough, or other officer, or "person or persons acting in his or their aid as aforesaid, "then on proof of such warrant the jury shall find for such "constable, headborough, or other officer, and for such per- "son and persons so acting as aforesaid, notwithstanding "such defect of jurisdiction as aforesaid; and if the verdict

Action not to be brought against constable till demand made of copy of warrant, &c.

" shall be given against the justice or justices, that in such " case the plaintiff or plaintiffs shall recover his, her, or their " costs against him or them, to be taxed in such manner " by the proper officer, as to include such costs as such " plaintiff or plaintiffs are liable to pay such defendant or " defendants for whom such verdict shall be found as afore- " said."

If, on verdict for the plaintiff in action against justice, the judge certify that the injury was wilfully and maliciously committed, the plaintiff to have double costs.

24 *Geo.* 2. c. 44. s. 7. " Provided always, that where the " plaintiff in any such action against any justice of the peace " shall obtain a verdict, in case the judge before whom the " cause shall be tried, shall, in open court, certify, on the " back of the record, that the injury, for which such action " was brought, was wilfully and maliciously committed, " the plaintiff shall be entitled to have and receive double " costs of suit."

IT has been holden that the statute of 43 *Eliz.* c. 2. extends to other actions against overseers of the poor, besides trespass for taking and selling of a distress.

Okeley v. Salter, B. R. T. 8 Jac. Yelv. 176.

THUS, where the plaintiff voluntarily paid money, for which he was assessed to the poor, and afterwards brought an action against the overseers for it's recovery, the Court adjudged it a case within the act; which, they said, should be construed largely, because it tended to the work of charity; and an action brought after such voluntary delivery of the money, was vexatious, which the statute intended to suppress. And it was agreed that the damages, sustained by the defendant by reason of the vexation, should be assessed by the jury,

but should be trebled by the Court, who were also to assess costs *de incremento*; because, properly, no evidence could be given to the jury relative to the costs, which depended upon the usage of the Court.

And in the report of the same case in *Noy*, it is said the Court likewise resolved, that, under this statute, the costs should not be trebled, but only the damages. Noy, 137.

It is fully established by the authorities cited in the margin, that, where a person is sued on account of something done by the authority of the 43 *Eliz.* c. 2, the *same* jury, who try the issue, may assess the treble damages given by that act; and that, if they assess only single damages, or if they omit to assess any damages at all, the Court will, on a verdict for the defendant, or nonsuit of the plaintiff, supply the omission by awarding a writ of inquiry of damages,— because if the principal jury had inquired of the treble damages, it would have been no more than an inquest of office, upon which the party could have had no attaint, if they had been excessive; and, moreover, this statute does not restrain the jury, by whom the issue is tried, to make the inquiry, but says, that the damages shall be assessed by that jury, or by writ of inquiry, as the same shall require. As a ground, however, for awarding such writ of inquiry, a suggestion must be entered upon the *postea*, that the defendant was an overseer of the poor, &c. and that the injury complained of was an act done in the execution of his office. But, where a defendant in replevin avows, as overseer of the poor, for a poor's rate under the 43 *Eliz.* c. 2, and the plaintiff is nonsuited, or

Carth. 362.
Salk. 205.
5 Mod. 76, 77. 118.
Skin. 595.
Comb. 344.
12 Mod. 85.
Holt, 191.
1 Ld. Raym. 59.
2 Str. 1021.
B. R. H. 138.
Say. Rep. 214.
2 Bl. 921.
3 Wils. 442.

a verdict passes against him, and no inquiry of damages made by the jury, it should seem that the entry of any suggestion, previous to the award of a writ of inquiry, is unnecessary, since, in such case, it appears already upon the record, that the defendant is a person entitled to treble damages under the statute.

Phelps v. Winchcomb, M. 13 Jac. 1. 3 Bulstr. 77. S.C. 1 Ro. Rep. 274. Moore, 845.

IT was the unanimous opinion of the Court in *Phelps v. Winchcomb*, that a *deputy* constable is a person enabled, by the statute 7 *Jac.* 1. c. 5, to plead the general issue, when sued for something done in that character; and is entitled under that act, if he obtain a verdict, to double costs. And it has been ruled at *Nisi Prius*, that this statute extends to every person who acts under the warrant of a justice of the peace.

Wenpenny's Case, Aug. Assizes, 13 Car. cor. Berkeley, J. Clayt. 54. cited 6 Vin. Abr. 348.

Entick v. Carrington and others, C. B. M. 6 G. 3. 11 St. Tr. 313. S. C. 2 Wils. 275. See these points discussed, but not decided. 3 Burr. 1752. &c. 1 Bl. 556.

BUT it has been adjudged, after solemn argument, that a secretary of state is not *ex officio*, a justice of the peace, and therefore not entitled to the benefit of 7 *Jac.* 1. c. 5. and 24 *Geo.* 2. c. 44. in favour of justices of the peace. Neither are the king's messengers in ordinary, officers within the protection or meaning of those statutes.

Styles, v. Cox, Bart. and others, P. 19 Car. 2. Vaugh. 111.

AN officer, specified in the 7 *Jac.* 1. c. 5, is entitled to the privilege of having the matter tried in the county, where the fact or injury complained of was committed, though impleaded for something done only by *colour* or pretence of his office, and not strictly by *virtue* or reason thereof.

Per Ld. Kenyon, in Alcock v. Andrews,

BUT a constable acting *colore officii* is not within, or en-

titled to the benefit of the statute of 24 *Geo.* 2. c. 44, which extends only to acts done *virtute officii*; as where a man acting *bonâ fide*, somewhat transgresses the bounds of his duty—but if he act as constable where he has no authority at all, the statute will afford him no protection.

Sittings at Westminster after Michaelmas, 1788. Vide 1 Str. 168.

To bring a person within this statute the act must be done in *obedience* to a warrant. And it is incumbent upon the officer to shew, that he scrupulously and implicitly pursued the dictates of his warrant, since it is on that condition alone, that he is entitled to the protection of the act. The legislature intended to make the justice liable instead of the officer; therefore the latter cannot be excused, where he commits such a mistake as will not render the magistrate liable.

3 Burr. 1766. 11 St. Tr. 320. 3 Burr. 1768. 1 Bl. 563.

As if the warrant direct the officer to apprehend the *authors*, *printers*, and *publishers* of a seditious libel, and he arrest persons who fall under none of those descriptions; or if the warrant command him to carry the person to be arrested, before A. and he carry him before B. So where, under a warrant to take up a loose and disorderly person, the officer takes up a woman of character;—or where he executes the warrant out of the proper jurisdiction. In none of these cases is the officer protected by the 24 *G.* 2. c. 44, because the foundation of his defence, under that statute, his *obedience to the warrant*, fails.

Money and others v. Leach, B. R. M. 6 G. 3. 3 Burr. 1742. S. C. 1 Bl. 555. 11 St. Tr. 307. Dawson *and* Clerk, coram Ld. Mansfield at Middlesex Sittings, cit. 1 Bl. 563. 3 Burr. 1761, 8. Ruled by Ld. Mansfield at Norwich assizes, cited 3 Burr. and 1 Blackst. ubi supra.

An overseer of the poor, who distrains for a poor's rate under the warrant of a justice of the peace, is an *officer* within the protection of this act.

Nutting v. Jackson, B. R. P. 13 G. 3. B. N. P. 24.

Feltham v. Terry, B. R. P. 13 G. 3. B. N. P. 24.

BUT this statute comprehends actions of *tort* only. Therefore, where an action for money had and received, was brought against an officer who had levied money under a conviction by a justice of the peace, the conviction having been quashed, it was holden that a demand of a copy of the warrant was not necessary.

IT has been determined that the statute 7 *Jac.* 1. c. 5. does not extend to actions for a *nonfeazance*, but only to those on account of some *temporal act done*, and wherein the defendant is, by that act, enabled to plead the *general issue*.

Herring v. Finch, B. R. P. 31 Car. 2. 2 Lev. 250.

THUS, where the plaintiff, a freeman entitled to vote at the election of a mayor, brought an action against the present mayor for refusing to receive his suffrage, and was nonsuited, the Court rejected a motion, on the part of the defendant, for double costs, under the 7 *Jac.* 1, saying, that it was not a case within the intent of that act; which included only actions for false imprisonment, or such matters, in which the defendant is thereby allowed the privilege of giving the special matter in evidence upon the general issue.

Stone v. Lingar, Cro. Car. 467.

So where an action was brought against defendant, constable of R. for falsely presenting that the plaintiff was an inhabitant, and occupier of lands in the parish of R. whereby he was unduly compelled to pay divers parochial assessments; plea, not guilty, and verdict for the defendant. By the Court, the defendant is not entitled to double costs, because this is not a species of action, in which the 7 *Jac.* 1. allows

the defendant to plead the general issue, and give the special matter in evidence.

Action upon the case against churchwardens for a false and malicious presentment of the plaintiff in the spiritual court, for incontinence. The defendants having obtained a verdict, moved for double costs; but by the Court, the cause of action here is merely ecclesiastical, and the statute never intended to give churchwardens double costs, but in vexatious suits concerning temporal matters, done by virtue of their office. Motion denied.

Kercheval v. Smith, Cro. Car. 285. S. C. 1 Jo. 305.

If the defendant obtain a verdict in an action on account of something done by virtue of his office, he shall have double or treble costs, as the case may be, notwithstanding the plaintiff's declaration be insufficient.

As where *baron* and *feme* brought trespass for a battery done to them both *ad damnum ipsorum*; on not guilty, a verdict was found for the defendant, and it was certified that it was done in the execution of his office, as constable. In consequence of which he moved for double costs upon 7 *Jac.* 1. c. 5, which was opposed on the ground, that the declaration being insufficient, judgment ought to have been given against the plaintiff upon *it*, and not upon the verdict, and so no costs. But the Court conceived that, as the defendant was found not guilty, and what he did was as officer, the plaintiffs should not take advantage of the insufficiency of the declaration and writ, to excuse themselves from double costs, which the statute gave the defendant for his vexation.

Helyer's Case, Cro. Car. 175.

Willet v. Tidey P. 3 W. and M. Carth. 188. S. C. 1 Show. 214. 12 Mod. 6.

In another case, the plaintiff declared upon an *indebitatus assumpsit* for money had and received by defendant to his use, and also for that the defendant had distrained several of his goods, and had deceitfully sold them for much less than he might have procured for them. *Quoad* the promise the defendant pleaded *non assumpsit*, and not guilty, to the residue, and, at the trial, obtained a general verdict. The judge, who tried the cause, certified, upon the *postea*, that the defendant's justification was, as to all, as collector of the royal aid by virtue of the statute 1 *W.* and *M.* c. 32; upon which it was holden that he should have treble costs under the tenth clause of that act.

Anon. C. B. P. 1 W. and M. 2 Vent. 45. Semb. acc. Wynch. 16. And according to 1 Cro. Pr. 278. this certificate must be made *at the trial.*

To entitle a constable to double costs under the 7 *Jac.* 1. c. 5, after a verdict for him, the judge, *who tries the cause*, must *certify* that the defendant acted by virtue of his office, or make him an allowance of double costs upon the record.

Grindley v. Holloway, B. R. H. 20 G. 3. Doug. 307.

As in an action of trespass, in which, on the plea of not guilty, a verdict was found for the defendant. A rule had been obtained to shew cause, why it should not be entered on the roll, that the defendant was a constable, and that the action was brought for what he had done in the execution of his office. There was no endorsement upon the *postea*, nor certificate; but, in an affidavit of the defendant, it was sworn, that the act for which he was sued, was done in the execution of his office.

In support of the rule, the defendant's counsel cited *Devenish* v. *Mertins*, a case upon this statute, where it is said,

that, when there is a verdict for the defendant, the facts entitling him to double costs, are to be put upon the record, by way of suggestion. He also mentioned some modern cases, which had been furnished him by the master, particularly one of *Hickman* v. *Goring*, *B. R. H.* 15 *G.* 3, a note of which was read by BULLER, *Justice*.

FOR the plaintiff it was insisted, that it was clear, from the words of the statute, that *the judge who tries the cause* must certify, that the act complained of was done by the defendant in the execution of his office. The statute did not say "such "defendant *shall be allowed* his double costs," but "the "*justice or justices*, &c. *shall allow him*," &c. Whether the defendant was or was not acting in the execution of his office, was an inference of law to be drawn from the particular facts proved, which the judge at *Nisi Prius* was able to do, but the Court could not, without trying the cause again. The defendant's affidavit was absurd; it was swearing to matter of law. *Devenish* v. *Mertins* was the case of a discontinuance; and what was there said about a suggestion, was foreign to the point before the Court.—An affidavit was then stated (which was read) by which it was said, it would appear, that the defendant was not acting in the execution of his office. The rule discharged.

BUT, where there is a special verdict, and it appears, by the facts found, that the act, for which the action was brought, was done by the defendant by virtue or reason of his office, as a justice of the peace, constable, &c. the master must tax

Rann v. Pickins, B. R. M. 23 G. 3. Doug. 308. n. († 82.)

double costs, though there has been no certificate, nor allowance by the judge who tried the cause.

In the last case, Lord Mansfield, and Buller, *Justice*, said, that, in common cases, where it does not appear upon the record, in what capacity the defendant was acting, an allowance by the judge is necessary, but not when it does appear on the record, that he was acting by virtue of his office; that the case of a discontinuance, provided for by the statute, shews, that the right to double costs was not meant to be confined entirely to such allowance of a judge at *Nisi Prius*. And the master being asked, said, he had no doubt, but that he ought to tax double costs.

Devenish v. Mertins, B. R. P. 7 G. 2. 2 Barnard. K. B. 373. 432. 449. S. C. B. N. P. 332. 2 Str. 974. Anon. T. 5 G. 2. 2 Barnard. K. B. 171. Semb. acc. Vide B. R. H. 125.

If the plaintiff discontinue, in an action against a justice of the peace, the Court will, upon an affidavit stating that the act, for which the defendant was sued, was done by virtue of his office, make a rule upon the master for the taxation of *double* costs.

The 7 *Jac.* 1. c. 5. expressly declares that "*the justice or "justices, &c. before whom the matter shall be tried, shall "allow*" unto the defendant his double costs; but the statutes, on which the three following cases were adjudged, enact, generally, that, on a verdict, &c. for the defendants, they "*shall recover*," &c. and, therefore, on these acts, though the judge at *Nisi Prius* did not certify that the defendant was acting by virtue of his office, or in a particular capacity, the Court, in cases of nonsuits at least, permitted

the defendant to come at his costs by making a suggestion upon the roll in the usual terms of such a certificate.

THIS was an action against the collector of the land-tax. The defendant carried down the cause to trial by proviso, and, (the plaintiff being nonsuited) afterwards moved for treble costs (1) as having been sued for something done as such collector; and, upon affidavits of the fact, the Court directed a suggestion to be entered upon the roll; "*quia* "*constat curiæ super examinationem quod, &c. ideo con-* "*sideratum est* that the nonsuit be recorded, and the de- "fendant recover treble costs."

Walker v. Sir Philip Egerton B. R. P. 7 W. 3. Comb. 322. S. C. cited 1 Str. 50.

Hunt v. Robinson, T. 5 G. 1. Cas. Pr. C. P. 16.

So where the plaintiff was nonsuited in an action against the defendants as commissioners, in the *Kensington* turnpike-act, 12 *G.* 1. c. 37, the Court permitted the entry of a similar suggestion to be made on the roll, in order that the defendants might obtain treble costs.

Catherol v. Cooper, B. R. H. 5 G. 2. 2 Barnard. K. B. 103. 117. S. C. 2 Kel. 59. cited 1 Str. 50.

AGAIN, in an action of trover against the defendants, as collectors of the tax for window-lights, the plaintiff, not being able to prove a property in the goods taken, was nonsuited; the defendants, upon an affidavit that they were officers, and acting in the execution of their office, obtained a rule for the plaintiff to shew cause why a suggestion should not be entered upon the roll to that purpose, in order to entitle them to double costs,

Barton v. Miles, B. R. T. 8 G. 2. B. R. H. 125.

IT was acknowledged by the defendants' counsel, on the

(1) Semb. under statute 4 W. and M. c. 1. s. 81.

motion, that the general method of allowing double costs was upon a certificate of the judge, who tried the cause, that the defendants were acting by virtue of their office; but that could not appear in this case, because, the plaintiffs being nonsuited for not shewing a title, no evidence, as to the taking, was heard.

Vide 2 Kel. 59. 2 Barnard. K. B. 103, 4. Adm. acc.

On the part of the plaintiff it was admitted that double costs must be given in favour of some of the defendants, but, it was said, that two of them were not collectors, but only assistants, to whom the act did not extend.

Lord Hardwicke.—They must make their suggestion as they can, but we can take no notice of the several capacities of the defendants, for it is *unica taxatio*, and not separate costs for every defendant. Rule absolute.

2 Barnard. K. B. 117. Sed vide 2 Str. 1120.

A suggestion upon the roll, that the defendant was sued for an act done by virtue of his office, for the purpose of obtaining double or treble costs, is conclusive as to the facts contained in it, therefore the plaintiff can neither plead nor demur to it.

Per Holt, Ch. J. Skin. 556.

Where the defendant is entitled to double costs, on a verdict for him, or nonsuit, &c. because sued for something done by virtue of his office, as justice of the peace, constable, &c. the costs *de incremento*, as well as those assessed by the jury, shall be doubled.

Vaugh. 117.

And, under statute 7 *Jac.* 1. c. 5, if there are several defendants, they are *all* in such case, entitled to double costs.

SECT. VI.

Of Costs in an Action relative to the Seizure of a Ship, or Goods, by an Officer of the Customs, or Excise.

By the statute 8 *Anne*, c. 7. s. 63, for preventing the great charges that the officers of the customs, seizing goods prohibited and uncustomed, are put to, by groundless and vexatious claims entered thereto in the court where such goods are prosecuted, it is enacted;—"That every person upon "entry of any claim in the court, where such prohibited and "uncustomed goods are prosecuted, shall be obliged to give "security in the penalty of thirty pounds, to answer and pay "the costs occasioned by such claim; and in default of giv-"ing such security within the time limited by the course of "that court for entering claims, such goods shall be re-"covered."

Persons to give security to answer costs occasioned by claiming goods seized, otherwise goods to be recovered.

15 *Geo.* 2. c. 31. s. 7. enacts—"That where any ship, "vessel, or boat whatsoever shall be seized by virtue of any "law now in force, made for the more effectual preventing "the exportation of wool, and where any ship, vessel, or "boat, of the burthen of one hundred tons, or under, shall "be seized for the unlawful importation of tea, brandy, ar-"rack, rum, strong-waters, or spirits, or for being used in "the relanding any goods whereon there is a draw-back or "bounty, or in the removing, carriage, or conveyance of "prohibited or uncustomed goods after the unshipping

" thereof, or for any other cause of forfeiture; every person,
" upon entry of any claim in the court where any such ship,
" vessel, or boat shall be prosecuted, shall be obliged to give
" security in the penalty of 30*l.* to answer and pay the costs
" occasioned by such claim, and in default thereof such ship,
" vessel, or boat, shall be recovered."

Claimants of vessels seized to give security for costs.

Prohibited or customable goods in any boat, &c. or house, &c. officer may stop, and warehouse the same until claimed, &c.

THE 6 *Geo.* 1. c. 21. s. 39. enacts—" That if prohibited
" or customable goods shall be found by any officer or of-
" ficers of the customs, in the custody of any person or per-
" sons, being in a bark, hoy, lighter, barge, boat, or wherry,
" on the water, or coming directly from the waterside, with-
" out the presence of an officer, or if such goods shall, upon
" the information of one or more credible person or persons,
" be found in any house, shop, cellar, warehouse, room, or
" other place, on a search there made in such manner as in
" and by an act made in the 14th year of the reign of the
" late King *Charles* the Second, entitled, *An for preventing*
" *frauds, and regulating abuses in his majesty's customs,*
" is mentioned and directed, it shall and may be lawful for
" such officer or officers to stop and put the said goods in his
" majesty's warehouse, in the port next to the place where
" such stop shall be made, there to remain until the claimer
" or claimers thereof, shall make proof by oath, or other-
" wise, to the satisfaction of the commissioners for ma-
" naging his majesty's customs, if such stop shall be made
" within the ports of *London* or *Edinburgh* respectively,
" that the duties of the customable goods have been paid,
" or secured to be paid, or that the same had been bought
" in a lawful way of trade, and that he, she, or they so

" claiming the said goods, do verily believe the duties there-
" of to have been paid, or secured to be paid, or that the said
" goods had been compounded for, or condemned in his ma-
" jesty's Court of Exchequer at *Westminster* or *Edinburgh*,
" or been otherwise delivered by writ of that court respec-
" tively, and that the prohibited goods had been compounded
" for, or condemned, or otherwise delivered, as aforesaid, in
" which case such goods shall and may be delivered without
" delay or charge: and if such goods shall be stopped in any
" other of the ports within this kingdom, the claimer or
" claimers thereof, shall and may make the like proof to the
" like purpose, as aforesaid, and deliver the same to the col-
" lector, or, in his absence, to one of the other principal of-
" ficers of the customs in the port where such stop shall be
" made; which proof shall, without loss of time, be trans-
" mitted to the said commissioners respectively, for their
" directions touching the immediate delivery of such goods,
" without charge to the claimer or claimers, or for the seizing
" and prosecuting of the same, as the said commissioners
" shall see cause."

Proof to be made in ten days after stopping.

6 *Geo.* 1. c. 21. s. 40. " Provided such proof be made
" within ten days after the goods shall have been so stopped,
" in failure whereof the same shall and may be seized and
" prosecuted in such manner as by the several and respective
" laws now in force against the importation of prohibited or
" uncustomed goods, is provided."

Proof of payment of duties to lie on the claimer.

6 *Geo.* 1. c. 21. s. 41. " And be it further enacted, that
" if upon such prosecution where no application hath been

" made to the commissioners or officers aforesaid, and not " otherwise, the property of the goods shall be claimed by " any person or persons, and if any question, dispute, or " doubt shall arise, whether the duties thereof were paid, or " secured, or that the said goods had been compounded for, " or condemned, or otherwise delivered by writ out of the " Court of Exchequer, or bought in a lawful way of trade, " the proof shall be incumbent upon such claimer or claimers, " and not on the seizor or prosecutor; and if thereupon a " verdict shall pass for such claimer or claimers, or if the of- " ficer or officers shall become nonsuit, or forbear prosecu- " tion, or discontinue the same, or if upon demurrer, or " otherwise, judgment shall be given against the officer or " officers, then and in any of the said cases, the claimer or " claimers shall, over and above the recovery of his, her, or " their goods, or the value thereof, have reasonable costs of " suit, for which he, she, or they shall have like remedy as " where costs are by law awarded, which said costs of suit " shall be reckoned and esteemed as a full satisfaction for " the said claimer or claimers damages, occasioned by the de- " tention and seizure of the said goods."

And if verdict shall pass for the claimer, he shall have reasonable costs of suit,

6 *Geo.* 1. c. 21. s. 43. " Provided always, that if the officer " or officers who shall stop such goods, or any other officer " or officers of the customs, shall be desirous to seize and " prosecute the same, notwithstanding any directions of " the commissioners of the customs for the delivery of the " said goods respectively, it shall and may be lawful to and " for such officer or officers to seize and prosecute the same " in such manner as by the several and respective laws of

Officers may prosecute, notwithstanding the directions of the commissioners.

" the customs now in force, such goods may be seized and " prosecuted, in every of which cases, the officer or officers so " prosecuting shall be liable to be sued by the owner or " owners of the said goods for the recovery of the same, or " the value thereof, with full costs of suit; or if the said " commissioners shall not order the delivery of the said goods " so stopt, then and in such case, the owner and owners, " claimer or claimers of such goods, shall and may neverthe- " less sue for the recovery of such goods, together with costs " and damages, according to the usual course of law, in any " of his majesty's courts of record at *Westminster*, or in the " Court of Exchequer in *Scotland*, as he or they might have " done before the passing of this act."

So may the owners.

By statute 15 *Car.* 2. c. 11. s. 19. " No appeal in any " cause of excise whatsoever shall be admitted, until the party " appellant shall have first deposited and laid down the single " duty of excise in the hands of the commissioners, farmers, " or sub-commissioners of excise, within whose jurisdiction " or division, the said cause was originally heard and deter- " mined, and have given security to the commissioners of " appeal or justice of the peace respectively where such cause " is to be finally adjudged, for all such fine, forfeiture, and " penalty as upon such hearing and determination was ad- " judged against him; and that if, upon the hearing and de- " termining of any such appeal, the said original judgment " shall happen to be reversed, then the said commissioners, " farmers, or sub-commissioners of excise, in whose hands " the said single duty of excise was deposited, shall restore " and deliver back the same, or as much thereof as shall be

No appeals in causes of excise to be admitted without security, &c.

If original judgment be reversed, party originally prosecuting to pay appellant double costs.

" adjudged by the commissioners of appeals or justices of the " peace respectively, to the said appellant, and the party ori- " ginally prosecuting shall pay him double costs; but in case " the first judgment shall be affirmed, the party appealing " shall pay the like costs unto the commissioner or com- " missioners complained of."

And *è converso* if first judgment be affirmed.

If judge certify a probable cause of seizure, though the claimer gain a verdict, he shall have no costs.

By 19 *Geo.* 2. c. 34. s. 16. it is enacted, " That in case " any information shall be commenced and brought to trial, " on account of the seizure of any ship as forfeited for ille- " gally carrying goods, or of any wool, goods, wares or " merchandizes, as prohibited or uncustomed, or illegally " carried or exported, or intended or attempted to be ex- " ported, or as illegally relanded after having been shipped " or exported upon debenture or certificate, wherein a verdict " shall be found for the claimer thereof, and it shall appear " to the judge or court, before whom the same shall be tried, " that there was a probable cause of seizure, the judge or " court before whom the said information shall be tried shall " certify on the record," &c. &c. [The remainder of this clause being the same as the 29th of 23 *G.* 3. c. 70, *mutatis mutandis*, it is unnecessary to set it out at length.]

If in a suit relative to the seizure of any goods, &c. the claimer obtain a verdict, and the judge certify that there was a probable cause for the seizure, the claimer shall not be entitled to any costs.

The 23 *Geo.* 3. c. 70. s. 29. enacts, " That in case any in- " formation or suit shall be commenced and brought to trial, on " account of the seizure of any goods, merchandizes, or com- " modities whatsoever, seized as forfeited by any act or acts of " parliament now in force, or hereafter to be made, relating to " his majesty's revenue of *excise* or *inland duties*, or of any " ship, vessel, or boat, or of any horses or other cattle, or of any

" carriages used or employed in removing or carrying the same,
" wherein a verdict shall be found for the claimer thereof; and
" it shall appear to the judge or court before whom the same
" shall be tried, that there was a probable cause of seizure,
" the judge or court before whom the same shall be tried,
" shall certify on the record that there was a probable cause
" for the prosecutor seizing the said goods, merchandizes,
" commodities, ships, vessels, boats, horses, or other cattle,
" or carriages, as the case may be; and in such case, the
" claimant shall not be entitled to any costs of suit whatso-
" ever, nor shall the person who seized the said goods, mer-
" chandizes, or commodities, or the said ships, vessels, or
" boats, or the horses, or other cattle or carriages, be liable
" to any action, indictment, or other suit or prosecution on
" account of such seizure; and that in case any action, in-
" dictment, or prosecution, shall be commenced and brought
" to trial, against any person or persons whatsoever, on ac-
" count of the seizure of any such goods, merchandizes, or
" commodities, or of any ships, vessels, boats, horses, or
" other cattle or carriages, used and employed in removing
" or carrying the same, wherein a verdict shall be given
" against the defendant or defendants, if the court or judge
" before whom such action, indictment, or prosecution,
" shall be tried, shall certify on the said record, that there
" was a probable cause for such seizure, then the plaintiff,
" besides the thing so seized, or the value thereof, shall not
" be entitled to above two-pence damages, nor to any costs
" of suit, nor shall the defendant in such prosecution be
" fined above one shilling."

In case any action, &c. be brought on account of such seizure, and the judge certify a probable cause for it, the defendant only liable to 2d. damages, and to no costs.

24 *Geo.* 3. c. 70. extended to officers of the *customs.*

By 24 *Geo.* 3. c. 47. s. 35. every clause, matter and regulation, in the 23 *Geo.* 3. c. 70, relating to actions against officers of the excise are extended to, "all actions to be "brought against any officer or officers of the *customs*, or "against any person or persons acting by his or their order, "and in his or their aid, for any thing done in the execution "of, or by reason of their office, and to all proceedings in "every such action, in as full and ample manner as if the "officers of the customs had been named and included in "the said act."

If in a trial for seizure of goods, wherein a verdict shall be given for the claimer, there shall appear to have been probable cause for such seizure, the defendant shall not be entitled to costs, &c.

The 26 *Geo.* 3. c. 40. s. 31. enacts—"That in case any "information shall be commenced and brought to trial, on "account of the seizure of any goods, or of any ship, boat, "or other vessel, or of any horse, cattle, or carriage, as for-"feited by this or any other act of parliament relating to his "majesty's *customs or excise*, or *other his majesty's revenues*, "wherein a verdict or sentence shall be given for the claimer "thereof, and it shall appear to the judge, justice, or court, "before whom the same shall be tried or heard, that there "was a probable cause of seizure, such judge, justice, or "court shall certify on the record, or other proceedings, that "there was a probable cause for the prosecutor's seizing the "said goods, ship, &c.; and in such case the defendant shall "not be entitled to any costs of suit whatsoever, nor shall "the person who seized the said goods, ship, &c. be liable to "any action, or other suit or prosecution, on account of such

And in any action for such seizure, in which the per-

"seizure; and in case any action, or other suit or prosecu-"tion, shall be commenced and brought to trial or hearing

" against any person or persons whatsoever, on account of " the seizing any such goods, ship, &c. *where no infor-* " *mation shall be commenced or brought to trial to condemn* " *the same*, and a verdict or sentence shall be given, upon " such action or prosecution, against the defendant or de- " fendants, if the court or judge, before whom such action " or prosecution may be brought, shall certify, in like man- " ner as aforesaid, that there was a probable cause for such " seizure, then the plaintiff, besides his goods, ship, &c. so " seized, or the value thereof, shall not be entitled to above " two-pence damages, nor to any costs of suit, nor shall the " defendant in such prosecution be fined above one shilling."

son who seized is defendant, he shall not be liable to more than 2d. damages, &c.

The 24th *sect.* of the statute 28 *Geo.* 3. c. 37. is a repetition, almost in terms, of the thirty-first of the 26 *Geo.* 3. c. 40, except that the 28 *Geo.* 3. c. 37. s. 24. extends to cases of seizures under the laws relating to the revenues of customs and excise only, without saying, *or other his majesty's revenues*;—and that the words, " *where no information shall* " *be commenced or brought to trial to condemn the same*," used in the latter branch of the clause in the 26 *Geo.* 3. are omitted in that branch of the 24th *sect.* of 28 *Geo.* 3, and those which follow, substituted in their place, viz. " *whether* " *any information shall be brought to trial to condemn the* " *same, or not.*"

The 23 *Geo.* 3. c. 70. s. 34. enacts,—" That if any action " or suit shall be brought or commenced against any person " or persons for any matter or thing done by any officer or " officers of excise, or any others acting in his or their aid,

Actions against officers of excise to be brought within three months after cause of action accrued.

" in execution of, or by reason of his or their office, such " action or suit shall be brought or commenced within three " months next after the cause of action shall arise, and " not afterwards; and shall be laid and tried in the county " or place where the facts were committed, and not in any " other county or place; and the defendant or defendants " shall and may plead the general issue, and give the special " matter in evidence at any trial to be had thereupon; and " if the plaintiff or plaintiffs shall become nonsuited, or dis- " continue his, her, or their action or suit, or if, upon a ver- " dict or demurrer, judgment shall be given against the " plaintiff or plaintiffs, the defendant or defendants shall " recover treble costs."

to which defendant may plead general issue, &c.

And if judgment be given against the plaintiff, defendant shall have treble costs.

Similar clause.

THE 28 *Geo.* 3. c. 37. s. 23. enacts, " That if any action " or suit shall be brought or commenced against any person or " persons for any thing by him or them done in pursuance of " this or any other act or acts of parliament now in force, or " hereafter to be made, relating to his majesty's revenues of " customs and excise, or either of them, such action or suit " shall be commenced within three months next after the " matter or thing done, and shall be laid in the proper " county; &c. &c. [as in 23 *Geo.* 3. c. 70. s. 34. *supra.*]

Officer may tender amends, and plead same in bar of action, &c.

23 *Geo.* 3. c. 70. s. 31. and 28 *Geo.* 3. c. 37. s. 26. " (1) It shall and may be lawful to and for any such officer " or officers, or other person or persons acting in his or their

(1) This and the following clauses are taken from the 28 *Geo.* 3. c. 37. but the 31, 32, and 33, sections of the 23 *Geo.* 3. c. 70. are, in effect and substance, the same, differing only in a few immaterial words.

"aid, to whom such notice (1) shall be given as aforesaid, "at any time within one calendar month after such notice "shall be given, to tender amends to the person or persons "complaining, or to his, her, or their agent or attorney; and "in case such amends are not accepted, to plead such tender "in bar to any action to be brought against him or them, "grounded on such writ or process, together with the plea of "not guilty, and any other plea or pleas, with leave of the "court in which such action shall be brought; and if, upon "issue joined thereon, the jury shall find the amends so "tendered to have been sufficient, then they shall give a ver- "dict for the defendant or defendants; and in such case, or "in case the plaintiff or plaintiffs shall become nonsuited, or "discontinue such action, or in case judgment shall be given "for such defendant or defendants, upon demurrer, then "such defendant or defendants shall be entitled to the like "costs as he or they would have been entitled to in case he "or they had pleaded the general issue only; and if, upon "issue so joined, the jury shall find that no amends were "tendered, or that the same were not sufficient, and also "against the defendant or defendants in such other plea or "pleas, then they shall give a verdict for such plaintiff or "plaintiffs, and such damages as they shall think proper, "*together with his or her costs of suit.*"

And if the jury shall find the same sufficient, they shall give a verdict for the defendant, who shall be entitled to treble costs.

But if they find that no amends were tendered, or that they were insufficient, they shall give a verdict for the plaintiff with damages.

italics are in 23 *Geo.* 3. c. 70. s. 31. but omitted in 28 *Geo.* 3. c. 37. s. 26.

The words printed in

(1) By 23 *Geo.* 3. c. 70, s. 30. and 28 *Geo.* 3. c. 37. s. 25. no writ or process shall be sued out against any person acting under any act of parliament relating to the customs or excise, until one calendar month after notice in writing shall have been delivered to him by the attorney or agent of the party intending to sue out such writ or process; —and the notice must contain the places of abode of the intended plaintiff, and his attorney, and also the cause of action, clearly and explicitly stated.

No evidence to be given but such as is contained in the notice of action.

23 *Geo.* 3. c. 70. s. 32. and 28 *Geo.* 3. c. 37. s. 27. "Provided always, that no such plaintiff or plaintiffs, in any "case where an action shall be grounded on any act done by "the defendant or defendants, shall be permitted to produce "any evidence of the cause of such action, except such as "shall be contained in the notice to be given as aforesaid, "or shall recover any verdict against such officer or officers, "or person or persons acting in his or their aid, unless it "shall be proved on the trial of such action that such notice "was given, and that in default of such proof the defendant "or defendants in such action shall recover a verdict and "costs as aforesaid."

If officer neglect to tender, or tender insufficient amends, before action brought, he may, before issue joined, pay money into court.

23 *Geo.* 3. c. 70. s. 33. and 28 *Geo.* 3. c. 37. s. 28. "And "be it further enacted, that in case any such officer or officers, "or other person or persons acting in his or their aid, shall "neglect to tender amends, or shall have tendered insufficient "amends before the action brought, it shall and may be lawful for him or them, by leave of the court in which such "action shall be brought, at any time before issue joined, to "pay into court such sum of money as he or they shall think "fit, whereupon such proceedings, orders, and judgments "shall be had, made, and given, in and by such court, as in "other actions where the defendant is allowed to pay money "into court."

Audley v. Wells, B. R. M. 29 Car. 2. 3 Keb. 767. 831.

It has been holden, upon the statute 15 *Car.* 2. c. 11. s. 19, that the person *in whose name* an information is exhibited before the sub-commissioners of excise (whose judgment is afterwards, upon appeal, reversed,) shall be deemed the *original* prosecutor, and liable to the double costs given,

in such case, to the appellant, although it may appear that another person was the real prosecutor, and that both the information before the sub-commissioners, and the appeal were instituted, and carried on by the direction, and on the behalf, of such other person.

UNDER the 8 *Anne*, c. 7. s. 63. the attorney-general, as well as the officer, is entitled to costs, where there is judgment for the king.

As where, in an information by a custom-house officer on a seizure of tobacco stalks as forfeited, by being imported contrary to the 12 *Geo.* 1. c. 28. s. 13. the defendant claimed property, and gave security in the penalty of 30*l.* to answer costs, pursuant to the 8 *Ann.* c. 7, and, by his plea, denied the supposed act of forfeiture. Upon which issue being joined, and a verdict found for the king, the attorney-general moved that the deputy-remembrancer might tax the bill of costs delivered to the defendant's clerk in court, and that after taxation the recognizance might be put in suit against the defendant's security.

Attorney-general v. Munn, In Scacc. H. 22 G. 2. Parker, 92.

FOR the defendant it was insisted, that the 8 *Anne* was only intended to indemnify the officer, against the charges which he might incur by groundless claims, but did not extend to any charges the crown might be put to.

BUT PARKER, *Ch. B.* and CLIVE, *B.* ordered the deputy to tax the attorney-general his costs occasioned by the claim,

No evidence to be given but such as is contained in the notice of action.

23 *Geo.* 3. c. 70. s. 32. and 28 *Geo.* 3. c. 37. s. 27. "Provided always, that no such plaintiff or plaintiffs, in any "case where an action shall be grounded on any act done by "the defendant or defendants, shall be permitted to produce "any evidence of the cause of such action, except such as "shall be contained in the notice to be given as aforesaid, "or shall recover any verdict against such officer or officers, "or person or persons acting in his or their aid, unless it "shall be proved on the trial of such action that such notice "was given, and that in default of such proof the defendant "or defendants in such action shall recover a verdict and "costs as aforesaid."

If officer neglect to tender, or tender insufficient amends, before action brought, he may, before issue joined, pay money into court.

23 *Geo.* 3. c. 70. s. 33. and 28 *Geo.* 3. c. 37. s. 28. "And "be it further enacted, that in case any such officer or officers, "or other person or persons acting in his or their aid, shall "neglect to tender amends, or shall have tendered insufficient "amends before the action brought, it shall and may be lawful for him or them, by leave of the court in which such "action shall be brought, at any time before issue joined, to "pay into court such sum of money as he or they shall think "fit, whereupon such proceedings, orders, and judgments "shall be had, made, and given, in and by such court, as in "other actions where the defendant is allowed to pay money "into court."

Audley v. Wells, B. R. M. 29 Car. 2. 3 Keb. 767. 831.

It has been holden, upon the statute 15 *Car.* 2. c. 11. s. 19, that the person *in whose name* an information is exhibited before the sub-commissioners of excise (whose judgment is afterwards, upon appeal, reversed,) shall be deemed the *original* prosecutor, and liable to the double costs given,

in such case, to the appellant, although it may appear that another person was the real prosecutor, and that both the information before the sub-commissioners, and the appeal were instituted, and carried on by the direction, and on the behalf, of such other person.

UNDER the 8 *Anne*, c. 7. s. 63. the attorney-general, as well as the officer, is entitled to costs, where there is judgment for the king.

As where, in an information by a custom-house officer on a seizure of tobacco stalks as forfeited, by being imported contrary to the 12 *Geo.* 1. c. 28. s. 13. the defendant claimed property, and gave security in the penalty of 30*l.* to answer costs, pursuant to the 8 *Ann.* c. 7, and, by his plea, denied the supposed act of forfeiture. Upon which issue being joined, and a verdict found for the king, the attorney-general moved that the deputy-remembrancer might tax the bill of costs delivered to the defendant's clerk in court, and that after taxation the recognizance might be put in suit against the defendant's security.

Attorney-general v. Munn, In Scacc. H. 22 G. 2. Parker, 92.

FOR the defendant it was insisted, that the 8 *Anne* was only intended to indemnify the officer, against the charges which he might incur by groundless claims, but did not extend to any charges the crown might be put to.

BUT PARKER, *Ch. B.* and CLIVE, *B.* ordered the deputy to tax the attorney-general his costs occasioned by the claim,

and that the recognizance should be put in suit against the security as prayed.

Shipton v. Newman, M. 8G. 1. InScacc. Bunb. 90.

UPON the trial of an information upon a seizure of cocoa-nuts, there was a verdict for the defendant; who then brought an action, in the Court of Common Pleas, for this seizure of the nuts, and also for some bags, which the officer took for the purpose of carrying away the nuts. The plaintiff having obtained a verdict, KING, *Chief Justice*, was of opinion he might have his costs and damages in the action below for the bags, but for the nuts the officer was acquitted, being included in the information; and the defendant in the information having a verdict thereon for him, his proper remedy was to move this court on the 6 *Geo.* 1. c. 21. Upon a motion, accordingly, in the Court of Exchequer, it was urged on the part of the officer, that the statute 6 *Geo.* 1. never designed the party a double remedy against the officer, but only gave him his election to bring his action, or have his costs under that act.

BUT by the Court, (*absente* MOUNTAGUE, *Baron*,) costs must be allowed on the information, for though the claimer has joined the nuts in his action, when he might have brought it for the bags alone, *that* shall not preclude him from the satisfaction the act gives him.

AND Mr. *Baron* PAGE added, that if the action had been brought for the nuts alone, and damages had been recovered, this Court would have allowed costs on the information,

because they ought to do right, though another court did wrong; and the party, in that case, could not have had judgment. A *quære* is put by the reporter at the end of this case.

Sullivan v. Montague, B. R.H. 19 G. 3. Doug. 2d. Ed. 106.

It should seem from the case of *Sullivan* v. *Montague*, that a certificate under the 19 *Geo.* 2. c. 34. s. 16, and the subsequent acts, *that there was a probable cause of seizure*, may be granted by the judge or court, at a period *subsequent* to the trial or sentence, and *out* of court; and that a court of *appeal* is competent to grant such a certificate.

Renalls v. Cooper, B. R. P. 22 G. 3. Doug. 2d. Ed. 108. n. [†45.]

In one case, it was determined, that a judge may certify, under the second branch of the 16th clause of the 19th *Geo.* 2. c. 34, though there had been no information brought in the *Exchequer*, for the condemnation of the ship or goods. But now, by the express words of the second branch of the 24th section of the 28 *Geo.* 3. c. 37, a certificate, that there was a probable cause for seizing a ship or goods as contraband, may be granted, *whether any information have been brought to trial to condemn the same, or not.*

A judge's certificate, that a custom-house officer had a probable cause for seizing goods, does not extend to injuries accompanying such seizure, so as to prevent the plaintiff from recovering damages and costs.

Baldwin v. Tankard and others, C. B. T. 28 G. 3. H. Bl. 28.

As where in trespass against custom-house officers, for forcibly entering the plaintiff's house, breaking locks, doors, &c. making disturbance, &c. and seizing the goods, &c. to

wit, one piece of printed callico, &c. the defendants pleaded not guilty;—upon the trial before Mr. *Justice* ASHURST at *Aylesbury* Lent-assizes, 1787, a verdict was found for the plaintiff, with 100*l.* damages. But the judge certified, *that there was a probable cause for the defendants' seizing the goods.*

IN *Easter* Term, 1787, a rule was obtained to shew cause why the plaintiff should not enter up judgment for his damages and costs, notwithstanding the judge's certificate. This rule in *Trinity* Term was enlarged to *Michaelmas* following, and in that Term was further enlarged till *Hilary* Term, when it was insisted that, as the judge had certified on the record a probable cause of seizure, under the 23 *Geo.* 3. c. 70. s. 29. and 26 *Geo.* 3. c. 40. s. 31. the plaintiff was entitled to no more than 2*d.* damages, besides the value of the goods.

IN support of the rule, it was argued, that the statutes, and the certificate of the judge extended only to *seizing* the goods, and not to any injuries accompanying the seizure, such as were charged in the declaration. The verdict is general, the several charges might have been distinguished, on the separate counts; but the jury have found the defendants guilty of all, and having given above 40*s.* damages, the plaintiff is entitled to them and his costs.

IN this term the Court declared their opinion in favour of the plaintiff, and made the rule absolute.

IF an officer of the excise pay money into court, in an

action duly instituted against him for seizing goods not exciseable, having omitted to tender amends before the bringing of the action, he shall recover only *single* costs, although the jury afterwards find a verdict for him, on the ground that the money paid into court was equivalent to the damage sustained by the plaintiff.

Collins and another v. Morgan and another, C. B. T. 29 G. 3. H. Bl. 244.

THUS where an action of trespass was brought against the defendants as officers of the excise, for seizing a quantity of tea and other goods not exciseable, of the plaintiff; the defendants made no tender of amends before the action was brought, but pleaded the general issue, and paid 16*l.* into court. Mr. *Baron* PERRYN, who tried the cause at the last assizes, at *Reading*, left it to the jury to consider whether this sum was sufficient for the damages of the plaintiff, and if so, they should find a verdict for the defendants; which they accordingly did.

ON taxing costs, the prothonotary allowed treble costs to the defendants, but did not sign the *allocatur*, leaving it to the plaintiffs to apply to the Court, if they thought proper, for a rule on him to review his taxation. A rule was accordingly granted in the last term, to shew cause why the taxation should not be reviewed by one of the prothonotaries, and why the costs should not be considered and taxed as single, instead of treble.

THE Court said, that it seemed on the true construction of the statute 23 *Geo.* 3. c. 70, that where the excise officers were originally in the wrong, (as was admitted here by pay-

ing money into court) unless they tendered amends in time, namely, before action brought, they were not entitled to treble costs; and as there was no tender of amends in the present case, they ought not to have more than single costs.

AND they added, that though at all events the officers of the excise had no right to treble costs under this statute, without having tendered amends, yet whether the tender of amends could give them that right, was a question not involved in the present decision, and which it would be time enough to determine when it actually arose. Rule absolute without costs.

A SIMILAR question was agitated in a very late case in the Exchequer, when that court, although they gave no decisive opinion, intimated pretty strongly their approbation of the construction put upon the above statute, by the Court of Common Pleas, in *Collins* v. *Morgan*.

Tye v. Saunders, in Excheq. P. 31 G. 3.

THE case was trespass against an excise officer; the defendant pleaded the general issue, not guilty, and paid money into court, upon the statute 23 *Geo.* 3. c. 70. s. 33, and afterwards the plaintiff not proceeding to trial in due time, judgment was given for the defendant as in the case of a nonsuit.

A RULE was obtained to shew cause why the officer of the court should not be directed to tax for the defendant, *single*, instead of treble costs.

AGAINST the rule it was argued, that the object of the

statute, which was to prevent vexatious actions, would be entirely frustrated if it were not construed to extend to this case. The plaintiff here proceeded vexatiously, in going on after the payment of money into court, and then suffering judgment to be given against him as in the case of a non-suit.

In support of the rule, it was insisted, that the true construction of the statute was, that no action, which at it's *commencement* could be deemed *vexatious*, should be prosecuted against any officer of the excise under the penalty, in case of failure therein, of treble costs. If any vexation exists here, it is the officer's, who, by neglecting to tender amends, previous to the commencement of the action, having received notice that it would be brought, compelled the plaintiff to sue. And the case of *Collins* v. *Morgan* has determined the point.

Eyre, *Chief Baron*.—What is to be tried after the payment of money into court? The defendant, in such case, would not be permitted to justify or controvert the original ground of action. Payment of money admits the injury *pro tanto*. The only remaining question, if the plaintiff elect to proceed further, concerns the *quantum* of damages. And on that question, I do not see why an excise officer should be put in a different situation from that of any other defendant, with respect to costs. At present the inclination of my opinion is in favour of the judgment of the Court of Common Pleas in the case cited.

HOTHAM, *Baron*, said, that, if he were to give an opinion then, it would be in confirmation of the same case.

PERRYN and THOMPSON, *Barons*, of same opinion.

EYRE, *Chief Baron*.—We will not make an order upon it.

CHAPTER IV.

OF COSTS IN PARTICULAR ACTIONS, AND PROCEEDINGS.

SECT. I.

Of Costs, in an Action of Replevin.

SECT. II.

In a Writ of Error.

SECT. III.

In an Action of Waste.

SECT. IV.

In an Action of Debt for not setting out Tithes.

SECT. V.

In a Suit upon a Writ of Scire Facias.

SECT. VI.

In Prohibition.

SECT. VII.

In Proceedings upon Writs of Mandamus.

SECT. VIII.

In a feigned Issue.

SECT. I.

Of Costs in an Action of Replevin.

3 Bl. Com. 146. THE institution of the action of Replevin is ascribed to *Glanvil*, chief justice to King *Henry* the Second, and is an action given to the party whose cattle or goods have been taken out of his possession by another by way of *distress*, to controvert Co. Litt. 145. b. the legality of such caption. Lord COKE defines Replevin to be, a redelivering of the pledge or thing distrained to the original possessor, on security given by him to try the right (1) of taking it, in an action at law, and, should *that* be determined against him, to restore (1) it to the distrainor. Gilb. Law of Distr. and Replev. 160. If the plaintiff obtain judgment in an action of replevin, having already got a restitution of the goods distrained, it can only be for the *damages* sustained by occasion of the unjust caption or detention. On the other hand, if the defendant prevail, he shall, except where the distress was for rent, (2) have judgment *pro retorno habendo* with damages. Where the judgment is given upon a *verdict*, or *nonsuit* at the trial, whether it may be for the plaintiff or defendant, the damages ought to be ascertained by the jury on the trial; but, in case the judgment is not founded on a verdict, but on a *demurrer* or *nonpros*, the damages may be assessed by a jury on a writ of inquiry.

(1) Pledges *de prosequendo* are by the common law, and those *de retorno habendo* by the statute of *Westminster* the second.

(2) As to which vide Stat. 17 Car. 2, c. 7. post.

FORMERLY, when the party distrained upon intended to dispute the right of the distress, he had no other process by the old common law than by a writ of replevin, *replegiari facias*. This writ, which is not returnable, issues out of Chancery, and is a *vicontiel* writ, in the nature of a *justicies*, commanding the sheriff to re-deliver the thing distrained to the owner, and afterwards to do justice between the parties with respect to the matter in controversy, in his own county court.

Co.Litt.145.b. 2 Inst.139,140. Doctr. Plac. 313. 5 Mod. 253. Gilb. Law of Distr. and Repl. 59. 13 Co. 31. 3 Bl. Comm. 147.

THE necessity of applying to the Court of Chancery for the writ of replevin, necessarily, rendered that mode of proceeding extremely tedious, and the beasts or other goods were, in consequence thereof, long detained from the owner, to his great loss and damage. To make this remedy, therefore, more expeditious, it is provided by the statute of *Marleberge*, that, where the goods of any man are taken and unjustly detained, the sheriff, upon *plaint* to him made, (without any writ out of Chancery) may proceed to replevy the same. By force of this statute, the sheriff may hold plea in replevin *by plaint* to any value, as he might at common law upon a writ of replevin. And to obviate, entirely, the delay which resulted from the common law proceeding, the sheriff may, by this act, upon complaint made to him, without writ, command his bailiff, either by parol or precept, to replevy the beasts or goods distrained; and this the sheriff may do immediately, though out of his county court, for it would be inconvenient and contrary to the scope of the statute, that the owner of the beasts, for whose benefit it was made, should be deprived of the possession of his beasts till the next county

2 Inst. 139.

52 H. 3. c. 21.

2 Inst. 139. 312. Doctr. Plac. 313.

2 Inst. 139. Vide Yearb. 16 H. 7. 14.

Bro. Tit. Rep. pl. 46. Co.Litt.145.b.

Vide Com. 591.

court, which is only held from month to month. But, in such case, the sheriff ought to enter the plaint at the next court.

Yearb. 19 H. 8. 12. a. 14 H. 7. 6. 34 H. 6. 5. 2 H. 4. 23. 2 Inst. 340, 341. Gilb. Law of Distr. and Repl. 66. 170.

ANOTHER mischief, which attended the replevin by writ, was, that, if the plaintiff had suffered himself to be *nonsuited*, the defendant, although he should have had judgment for a return, could not have had it *irreplevisable*, but the plaintiff might have sued out a new writ of replevin for the same distress, and so *in infinitum*, to the intolerable vexation of the defendant. Thus stood the law till the statute of *Westminster* 2, which restrains the plaintiff from suing out any new replevin after having been nonsuited, but gives him a judicial writ, called a writ of *second deliverance*. (1) This writ, which must recite the former judgment, issues out of the original record of the replevin in which the nonsuit was, and commands the sheriff to deliver the same distress again to the plaintiff. If the plaintiff be nonsuited in the second deliverance, or there be judgment for the defendant, either by discontinuance of the plea, or abatement of the writ, by the abovementioned act, a *return irreplevisable*, shall be awarded, after which there can be no new replevin, or writ of second deliverance. But notwithstanding this judgment be for a return irreplevisable, the absolute property of the beasts or

13 Ed. 1. c. 2.

(1) Although a writ of *second deliverance* is a *supersedeas* of the writ *de retorno habendo*, it has been determined not to be a *supersedeas* of the writ of inquiry of damages upon the statute 17 *Car.* 2. c. 7.; (vide post.) therefore it should seem that the writ of second deliverance is in effect taken away in the case of a distress for rent arrear, where the defendant proceeds upon that statute by writ of inquiry of damages, and does not pursue the common law judgment *de retorno habendo*. Vide 2 Wils. 116. and cases there cited. 1 Vent. 64.

other goods is not thereby vested in the defendant, but they still remain as a pledge in his hands, subject to redemption by the tenant, upon payment of the rent or duty for which they were originally distrained; and if the defendant detain them after tender of such rent or duty, the plaintiff may maintain an action of detinue for such subsequent detention. But, by the common law, when the defendant obtained judgment in replevin, upon *verdict* or *demurrer*, there was a return irreplevisable granted, upon which there could be no fresh replevin, nor can there now, in either case, be a writ of second deliverance, by virtue of the statute of *Westminster* the second, which extends only to cases of nonsuit.

2 Inst. 107. 341.

Yearb. 14. H. 7. 6. pl. 14. 2 Ro. Abr. 434. 2 Inst. 340.

Avowant to have damages and costs, where the plaintiff is barred, or avowry found against him.

THE statute 7 *H.* 8. c. 4. s. 3. enacts, "That every avowant, and every other person or persons that make avowry, cognizance, or knowledge, or justify, as bailiff to any other person or persons, in any *replegiari*, or second deliverance, for any rent, custom, or service, if their avowry, cognizance, or justification be found for them, or the plaintiffs in the said actions otherwise barred, shall recover their damages and costs that they have sustained, as the plaintiffs should have done, if they had recovered in the said replevins."

Avowant to have costs and damages, where the avowry is found for him,

THIS statute specifying only avowries or recognizances for *rents*, *customs*, and *services*, it's provisions were further extended by the 21 *H.* 8. c. 19. s. 3.—by which it is enacted, "That every avowant, and every other person or persons that make any such avowry, justification, or cognizance, as bailiff or servant to any person or persons, in

or the plaintiff is nonsuited, or barred.

" any *replegiari*, or second deliverance, for rents, customs, " services, or for damage-feasant, or other rent or rents, upon " any distress taken in any lands or tenements, if the same " avowry, cognizance, or justification be found for them, or " the plaintiffs in the same be nonsuited, or otherwise barred, " that then they shall recover their damages and costs against " the said plaintiffs, as the same plaintiffs should have done " or had, if they had recovered."

If the plaintiff in replevin be nonsuited before issue joined, where the distress was for rent, the defendant, making a suggestion in nature of an avowry or cognizance, shall have a writ to inquire of the arrears of the rent and value of the goods.

By the 17 *Car.* 2. c. 7. s. 2. (extended to *Wales* and the counties Palatine by 19 *Car.* 2. c. 5.) it is enacted, " That " whensoever any plaintiff in replevin, upon a distress *for* " *rent*, shall be nonsuit before issue joined, in any suit of " replevin by plaint or writ, lawfully returned, removed, or " depending in any of the king's courts at *Westminster*, that " the defendant making a suggestion in nature of an avowry " or cognizance for arrearages of rent, to ascertain the " court of the cause of distress, the court, upon his prayer, " shall award a writ to the sheriff of the county where the " distress was taken, to inquire by the oaths of twelve good " and lawful men of his bailiwick, touching the sum in " arrear at the time of such distress taken, and the value of " the goods or cattle distrained: and thereupon notice of " fifteen days shall be given to the plaintiff or his attorney " in court, of the sitting of such inquiry; and thereupon the " sheriff shall inquire of the truth of the matters contained " in such writ, by the oaths of twelve good and lawful men

And upon the return of such writ, the defendant shall have judgment

" of his county: and upon the return of such inquisition, the " defendant shall have judgment to recover against the plain- " tiff the arrearages of such rent, in case the goods or cattle

"distrained shall amount unto that value; and in case "they shall not amount to that value, then so much as the "value of the said goods and cattle so distrained shall "amount unto, together with his full costs of suit, and shall "have execution thereupon by *fieri facias* or *elegit*, or other- "wise as the law shall require. And in case such plaintiff "shall be nonsuit after cognizance or avowry made, and "issue joined, or if the verdict shall be given against such "plaintiff, then the jurors that are impannelled or returned "to inquire of such issue, shall, at the prayer of the defen- "dant, inquire concerning the sum of the arrears, and the "value of the goods or cattle distrained, and thereupon the "avowant, or he that makes cognizance, shall have judg- "ment for such arrearages, or so much thereof as the goods "or cattle distrained amount unto, together with his full "costs, and shall have execution for the same as above- "mentioned."

for the arrears of the rent, if goods distrained are of that value, and if not of that value, for so much as they are worth, with full costs of suit.

If plaintiff be nonsuited after issue joined, or if there be a verdict against him, the jurors, impannelled to try the issue, shall inquire of the arrears and value of the goods distrained, &c.

17 *Car.* 2. c. 7. s. 3. enacts, "That if judgment in any of "the courts aforesaid, be given upon demurrer for the "avowant, or him that maketh cognizance for any rent, "the Court shall, at the prayer of the defendant, award a "writ to inquire of the value of such distress; and upon the "return thereof, judgment shall be given for the avowant, or "him that makes cognizance as aforesaid, for the arrears "alleged to be behind in such avowry or cognizance, if the "goods or cattle so distrained shall amount to that value; and "in case they shall not amount to that value, then for so much "as the same goods or cattle amount unto, together with his "full costs of suit, and shall have like execution as aforesaid."

If judgment be given upon demurrer, for the avowant, a writ shall be awarded to inquire of the value of the distress, &c.

Defendants in replevin may avow or make cognizance generally, and shall have double costs if the plaintiff be nonsuited, &c.

By the 11 *Geo.* 2. c. 19. s. 22. after reciting that great difficulties often arise in making avowries or cognizance upon distresses for rent, quit-rents, reliefs, heriots, and other services, it is enacted, "That it shall and may be lawful to "and for all defendants in replevin to avow or make cogni- "zance generally, that the plaintiff in replevin, or other "tenant of the lands and tenements whereon such distress "was made, enjoyed the same under a grant or demise, at "such a certain rent, during the time wherein the rent dis- "trained for incurred, which rent was then, and still re- "mains due, or that the place where the distress was taken "was parcel of such certain tenements, held of such honour, "lordship, or manor, for which tenements the rent, relief, "heriot, or other service distrained for, was at the time of "such distress and still remains due; without further setting "forth the grant, tenure, demise, or title of such landlord or "landlords, lessor or lessors, owner or owners, of such "manors; and if the plaintiff or plaintiffs in such action "shall become nonsuit, discontinue his, her, or their action, "or have judgment given against him, her, or them, the de- "fendant or defendants in such replevin shall recover double "costs of suit."

Gilb. H. C. P. 273.

It has, already, been observed that a plaintiff, in an action of replevin, might have recovered *damages* at the common law, previous to the statute of *Gloucester*, 6 *Ed.* 1. c. 1.; that being the case, it follows, by virtue of that statute, that he is now also entitled to *costs* in such action, as a consequence of those damages. But although a defendant in replevin was, in many cases, where an avowry or cognizance

W. Jon. 434. 2 Danv. 226.

was made, and a return prayed, an actor, yet he could not recover damages at the common law; therefore, notwithstanding judgment might be given in his favour, the statute of *Gloucester* afforded him no right to costs. However, at length, this hardship was, in a great measure, remedied by the statutes of 7 *H* 8. c. 4. and 21 *H.* 8. c. 19, which have, in the cases therein enumerated, very equitably, put defendants and plaintiffs in replevin upon the same footing, with respect to damages and costs.

The first cases, which occurred upon these statutes, are contradictory, but it may be proper to take a cursory view of them; though a knowledge of them, as far, at least, as they relate to the right of defendants in replevin to costs, is rendered of little importance by the statute of 4 *Jac.* 1. c. 3. The plaintiff having been nonsuited upon an avowry for an amercement in a court-leet, for not doing suit, it was resolved, that the defendant should not have costs, by the 21 *H.* 8. c. 19. And in a subsequent case, which was replevin against two, one of the defendants pleaded not guilty, and the other justified by reason of an amercement in a leet; to the latter plea there was a demurrer, which was adjudged for the avowant, and the issue was afterwards tried and found for the defendant, and *damages and costs* assessed for both; upon motion that no judgment should be given for the damages and costs, this not being a case within either of the statutes of *H.* 8, the Court at first doubted much thereof, but afterwards upon consideration of the 4 *Jac.* 1. c. 3, they held the avowant should have costs, but advised him to take judgment for these alone, and to release his damages; and so it

Porter v. Gray, B. R. P. 31 Eliz. Cro. Eliz. 301. Acc. Arg. Cro. Jac. 28. acc. per Holt, Ch. J. Carth. 179. Et vide W. Jon. 435.

Samuel v. Hoder, B. R. H. 16 Jac. 1. Cro. Jac. 520. S. C. Moore, 893. 2 Ro. Rep. 74. Vide Cro. Car. 534. Jon. 421. 434. Mar. 30.

B.R.T.36Eliz. Cro. Eliz. 330. S. C. Ow. 14. Vide Co. Ent. 572. b. 573. a.

was adjudged. But in the reports of the case of *Haselop* v. *Chaplin*, it is said that many precedents were shewn out of the Common Pleas, in which, always since the statutes of *H.* 8, *damages and costs* had been given to the avowant in avowries for amercements in leets, and for heriots, and in other cases not mentioned in these statutes.

Haselop v. Chaplin, B. R. T. 36 Eliz. Cro. Eliz. 257. 330. S. C. Ow. 13. Moore, 893. contra.

In error upon a judgment in the Common Pleas, in replevin, the error assigned was, that, upon an avowry for an *estray*, the defendant had had a return awarded to him, with costs and damages, whereas he was entitled to neither, in this case, under the statute of 7 *H.* 8. or 21 *H.* 8.; the Court at first conceived it to be error, but, afterwards many precedents being shewn from the Common Pleas, wherein damages and costs had been given to avowants in cases not specified in the statutes, they inclined to that opinion; however the judgment was reversed for another (1) cause.

Mackworth v. Shepward, B. R. P. 2 Jac. 1. Cro. Jac. 27. Vide Cro. Car. 533. W. Jon. 435. Mar. 30.

Judgment having been given for the defendant upon a demurrer to a cognizance for a *relief*, the question was whether he should have costs and damages under the 21 *H.* 8. c. 19. Popham, said, that upon a distress for a *heriot* there is not any question but costs shall be paid. But the Court, not being satisfied whether or not costs were allowable in this case, advised the defendant to take his judgment for the relief, the plaintiff offering it in court, and to release his damages and costs;—which was done accordingly.

(1) Sed vide Jon. 435. where it is said by *Brampston*, Ch. J. that the judgment in *Haselop* v. *Chaplin*, was reversed *because damages and costs had been given*, and that this reason was entered upon the roll.

In another case, the defendant, in an action of replevin, made cognizance for a *penalty* assessed for the breach of a bye-law made at a court leet; and judgment having been given for the defendant in the Common Pleas, the plaintiff brought a writ of error, in the Court of King's Bench, and assigned for error, that *damages and costs* had been given to the defendant, whereas this was not a case within either the statute of 7 *H.* 8. or that of the 21 *H.* 8. The question was gone into much at large by the Court; but the judges being qually divided in opinion, no judgment was given. Brampston, *Chief Justice*, and Jones, *Justice*, argued that the judgment ought to be reversed for the cause above stated, but Croke and Berkeley, *Justices*, were of a contrary opinion, holding this to be a case within the reason and equity of the above statutes.

James v. Tintney, B. R. T. 15 Car. Cro. Car. 497. 532. S. C. W. Jon. 421. 434. March, 28.

It hath been determined that a defendant in replevin shall not have costs, if he claim property in the thing distrained, because that is a case omitted out of the statute of 21 *H.* 8. c. 19.

Hard. 153.

But whatever doubts might, formerly, or may now be entertained concerning the right of a defendant, in an action of replevin, to both *damages* and costs, in the cases above noticed, under the 7 *H.* 8. or 21 *H.* 8, it should seem, at this day, that the statutes of 4 *Jac.* 1. c. 3. and 8 and 9 *W.* 3. c. 11. give him an indisputable right to *costs*, wherever judgment is given in his favour, upon *demurrer*, *verdict*, or *nonsuit* of the plaintiff, be the cause, for which the distress was taken, what it may. By the former of these statutes, a defendant,

Vide ante, 185.

obtaining judgment upon verdict, or nonsuit, is entitled to recover costs, in every species of action, wherein the plaintiff, if he had prevailed, might have recovered them. And we have seen that, as a plaintiff in replevin might recover damages in that action, before the statute of *Gloucester*, 6 *Ed.* 1. c. 1, so he may now, by that statute, where he succeeds, recover costs. And, by the act of *William* the Third, costs are given to a defendant, if judgment pass for him upon any demurrer, either by plaintiff or defendant; that is, in a kind of action, where the plaintiff would have had costs, on the demurrer being adjudged for *him*,—of which sort is the action of replevin.

Vide ante, 148.

If several issues are joined upon an avowry, some of which are found for, and the others against, the defendant, he shall have costs and damages, but the plaintiff shall have neither.

Denton v. Parsons, B. R. P. 16 Jac. 1. Cro. Jac. 473. S. C. 2 Ro. Rep. 37. but no judgment given. Sed vide Brownl. 173. Semb. S. C. contra.

As where to an avowry, in replevin, for 36*l.* rent, the plaintiff pleaded as to 12*l.* payment, and as to the residue (viz. 24*l.*) a collateral agreement and satisfaction; the first issue was found for the plaintiff, and the second for the defendant; upon which it was adjudged, that the plaintiff should recover neither damages nor costs, but that the avowant should have a return, with both damages and costs (1).

(1) According to *Rolle's* report of *Denton* v. *Parsons*, upon motion on the behalf of the plaintiff, that he might have judgment for his costs and damages, *Doderidge*, J. told the counsel to take his judgment at his peril, for they would not direct him. But the judgment actually entered upon the record, corresponds with the report in *Croke*, vide a transcript of it in 2 *Lutw.* 1195.

BUT where, in replevin, the defendants justified the taking under an attachment from a county court, against the goods of one D., whose property the distress was, and, on issue joined on the property being in D., a verdict was found as to part for the plaintiff, and as to the residue for the defendants (*viz.* that the property of part of the goods was in the plaintiff, and that of the residue in D. the defendant in the county court,) and assessed damages and costs for both parties; it was adjudged that the plaintiff should have both costs and damages, but the defendants *only costs* (1.)

Winnard v. Foster, C. B. T. 3 W. and M. 2 Lutw. 1190. N. L. 374.

A DEFENDANT in replevin is not entitled to costs, where there is judgment upon the plaintiff's confession of the plea of *prisal en auter lieu.*

THUS, in replevin, for taking cattle at a place called A., the defendants pleaded that they took them at a place called B. *absque hoc* that they took them at A. and for a return avowed, &c. The plea being confessed by the plaintiff, the avowant had judgment that the writ should abate, and for a return, and, thereupon, moved to have costs; but the motion was rejected: and by the Court,—the reason why the defendants, in this case, cannot have costs, is, because the plaintiff is not barred from having another replevin, and driven to his writ of second deliverance; but notwithstand-

Smith v. Walker and another, B. R. T. 1 Ann. 2 Ld. Raym. 788. S.C. Com. 122.

(1) Mr. Serj. *Lutwiche* cites many precedents of judgments in replevin, where part is found upon verdict, or adjudged on demurrer, for the plaintiff, and part for the defendant; in some of these the defendants appear to have received judgment for both damages and costs, in others for costs only, and in others for neither one, nor the other. Vide 2 *Lutw.* 1197.

ing this confession and the abatement of this writ, he may have a new replevin. But if issue had been joined upon the place of the taking, and found for the defendants, they would have had costs.

Farnell v. Keightly, B.R. T. 22 Jac. 2 Ro. Rep. 457. S.C. W. Bendl. 145.

IT has been adjudged, that an executor, making an avowry, under the 32 *H.* 8. c. 37, is entitled to costs by force of the statutes of 7 *H.* 8. and 21 *H.* 8; for though the 32 *H.* 8. c. 37. makes no mention of costs, and is subsequent in point of time to both the other statutes giving costs to avowants, yet it enables the executors and administrators of the tenants therein specified, to distrain and avow as their testators or intestates might have done, and they shall have the same advantages.

1 Lill. Pract. Reg. 472.

A PLAINTIFF or avowant in an action of replevin, if the avowry be for damage-feasant or rent, is entitled to damages and costs, where judgment is given in his favour, upon a *special*, as well as upon a general verdict.

Lloyd v. Winton, C. B. M. 29 G. 2. 2 Wils. 28. S. C. Barnes, 148.

IF a plaintiff in replevin on an avowry for a *seizure* for a *heriot-custom*, be nonsuited, the avowant is not entitled to double costs under the 11 *Geo.* 2. c. 19; because the avowry not being for a distress, the case is not within the statute.

Eggleton v. Smart, B. R. T. 2 G. 3. 1 Bl. 375. S.C. B.N.P. 61. S. P. Jones v. Concannon, B.R.T. 30 G. 3. 3 T. R. 661.

IN replevin both plaintiff and defendant are actors, and, therefore, either of them may carry down the cause to trial, and if the defendant give notice, and do not proceed to trial, the Court will give costs against him. And, for the same reason, a defendant, in an action of replevin, cannot have

judgment as in case of a nonsuit for not going to trial, according to the practice of the court. Contra, Bentley v. Scott, C. B. P. 26 G. 2. Barnes, 317.

SECT. II.

Of Costs in a Writ of Error.

A WRIT of error is grantable *ex debito justitiæ*, in all cases, except treason and felony; it issues out of Chancery, and lies where a man is grieved by any error in the foundation, proceeding, judgment, or execution of a suit. But without a judgment, or an award in nature of a judgment, no writ of error lies, for the words of the writ are, *si judicium reditum sit*. And such judgment must have been given by *a court of record*, for no writ of *error* lies for the rectifying of the errors or mistakes in the proceedings of a base court, *not* of record, but only a writ of *false judgment*. Salk. 504. Co. Litt. 288. b. 11 Co. 38. &c. Co. Litt. 117. b. et ubi supra. Finch's Law, 479. 484.

THE writ, of which we are now speaking, is in the nature of a commission to judges of a superior court, by which they are authorized to examine the record, upon which a judgment was given in an inferior court; and, on such examination, to affirm, or reverse the same, according to law. However, a writ of error may be brought in the same court, in which the judgment was given, when the error assigned is not for any fault in the judgment of the Court, but for some defect in the execution of the process; for misprision of the clerk; or for default in adjudging execution. This writ also lies in the same court, wherein the proceedings originally 2 Bac. Abr. 187. 2 Inst. 40. Jenk. Cent. 25. 7 H. 6. 30. 1 Ro. Abr. 746. Com. Dig. Tit. Pleader, (3 B. 1.) and the cases there cited.

were, upon errors in matters of *fact*; for error in fact is not the error of the judges, and, therefore, reversing it is not impeaching their own judgment. But for error in the proceed-
3Bl.Com.407. ings of a court of record in point of *law*, the writ must be brought in a *superior* court; and such writ of error only lies upon matter of *law* arising upon the face of the proceedings, so that no evidence is required to substantiate or support it. As for error in the *determination* of facts, the mode of obtaining redress in such case, is not by writ of error, but by an *attaint* of the jury, or appealing to the justice of the court to grant a *new trial*, in order to correct the mistakes of the former verdict.

Carth. 7.
3 Mod 134.
1 Ld. Raym. 71.
870. 1403.
1 Ro. Abr. 747.
Com. Dig. Tit. Pleader, (3 B. 9.)
Carth. 8.
Yelv. 4.
8 Mod. 305.
B. R. H. 136.
Com. Dig. Tit. Pleader, (3 B. 10.)
1 Ro. Abr. 749.

ALL persons against whom a judgment is given, ought, if living, regularly to join in a writ of error thereon, for, though some of them may not be interested in the reversal, they must all join for conformity. But if any of them refuse, he or they may be summoned and severed. And error ought to be brought against all the parties, to the recovery. But it lies not against any one, but him who was party, or privy to the first judgment.

Cro. Eliz. 26.
Dy. 250.
1 Leo. 55.
3 Leo. 159.
Finch L. 480.
Contra 1 Ro. Abr. 745. pl. 15. F. N. B. 20 D. et vide Carth. 222.

A WRIT of error lies from almost all inferior courts of record in *England* into the King's Bench; but it has been holden, that a writ of error does not lie in the Common Pleas, from any inferior court of record. It also lies from the Common Pleas at *Westminster*, to the King's Bench; whence the cause is then removeable to the House of Lords. On proceedings in the King's Bench, where the action was commenced by *bill*, a writ of error lies into the Court of Exche-

quer-chamber, holden before the judges of the Common Pleas and barons of the Exchequer; and from thence it lies to the House of Peers; but where the proceedings in the King's Bench begin by *original writ*, error lies thereon immediately, without any intermediate stage of appeal, to the House of Lords. From proceedings on the *law-side* of the Exchequer, it lies into the Court of Exchequer-chamber, holden before the lord chancellor, lord treasurer, and judges of the Courts of King's Bench, and Common Pleas: and thence to the House of Peers.

At common law, there were no costs in a writ of error. Cro. Eliz. 588. Raym. 135.

The 3 *H.* 7. c. 10. is the first statute, which mentions costs in error, and after reciting that the plaintiff or demandant, who hath judgment to recover, is oftentimes delayed of execution, for that the defendant or tenant, against whom judgment is given, or other who is bound by the said judgment, sueth a writ of error to annul and reverse the same, to the intent only to delay execution thereof, enacts—

The 19 H. 7. c. 20. confirms this statute, and enacts that it shall from thenceforth be duly put in execution.

"That if any such defendant or tenant, defendants or "tenants, or any other who shall be bound by the said judg- "ment, sue, afore execution had, any writ of error to reverse "any such judgment, in delaying of execution; that then, "if the said judgment be affirmed in the said writ of error, "or the said writ of error be discontinued in the default of "the party, or any person who sueth a writ of error, be "nonsuited in the same, the said person or persons against "whom the said writ of error is sued, shall recover his costs "and damage, for his delay and wrongful vexation in the

If the judgment be affirmed on writ of error, the writ be discontinued, or the party suing it be nonsuited, the defendant in error to have costs.

" same, by discretion of the justice afore whom the said writ " of error is sued."

The defendant to have double costs for delay of his execution by writ of error.

13 *Car.* 2. stat. 2. c. 2. s. 10. enacts, " That if any per- " son or persons shall sue or prosecute any writ or writs of " error, for reversal of any judgment whatsoever, given after " a verdict, in any of the courts of record at *Westminster*, " or in the counties palatine of *Chester*, *Lancaster*, or *Dur- " bam*, or in any court of great sessions in *Wales*, and the " said judgment shall afterwards be affirmed, then every such " person or persons, shall pay unto the defendant or defen- " dants in the said writ or writs of error, his or their double " costs, to be assessed by the court where such writ of " error shall be depending, for the delaying of such exe- " cution."

Not to extend to popular actions, &c.

13 *Car.* 2. st. 2. c. 2. s. 11. " Provided nevertheless, that " this act shall not extend to any action popular, nor action " upon any penal law or statute (except debt for not setting " out tithes), nor to any indictment, presentment, inquisi- " tion, information, or appeal."

On quashing writs of error, defendants therein to have costs as upon affirmance of the judgment.

By 4 *Anne*, c. 16. s. 25. for the preventing great vexation from suing out defective writs of error, it is enacted, " That " upon the quashing of any writ of error for variance from " the original record, or other defect, the defendants, in such " error, shall recover against the plaintiff or plaintiffs, issuing " out such writ, his costs, as he should have had if the " judgment had been affirmed, and to be recovered in the " same manner."

THE foregoing statutes entitle defendants in error to costs, only where the writ is sued by the defendants below, but contain no provision with regard to the costs of a writ of error brought by the *plaintiff* in the original action upon a judgment for the defendant. To supply this defect, the statute 8 and 9 *W.* 3. c. 11. s. 2. enacts—"That if, at any "time after judgment given for the defendant, in any action, "plaint, or suit, the plaintiff or demandant shall sue any "writ or writs of error to annul the said judgment, and the "said judgment shall be afterwards affirmed to be good, or "the said writ of error shall be discontinued, or the plaintiff "shall be nonsuited therein, the defendant or tenant in every "such writ of error, shall have judgment to recover his costs, "against every such plaintiff or demandant, and have exe-"cution for the same by *capias ad satisfaciendum, fieri "facias*, or *elegit*."

Vide Bowton v. Nicholls, Cro. Car. 401. Et vide etiam 2 And. 124.

Defendants in error to have costs upon writs of error, sued out by the plaintiffs, in the original action.

IT was, formerly, doubted, whether the 3 *H.* 7. c. 10. extends to give costs upon a writ of error created by a subsequent statute; as upon a writ of error in the Exchequer-chamber, which is by virtue of the 27 *Elix.* c. 8. But it is now clear that the 3 *H.* 7. does extend to the court of error from the King's Bench in the Exchequer-chamber.

Penruddock v. Errington, Cro. Eliz. 587. Vide Gilb. H. C. P. 275.

IF a writ of error be brought *after execution*, though the judgment be affirmed, the defendant in error is not entitled to costs under the 3 *H.* 7, because that act operates to give costs only where the execution is *delayed* by the writ of error.

Eardley v. Turnock, Cro. Jac. 636. S. P. 2 Keb. 391, 673. 882. Acc. 2 Str. 1199.

So there can be no costs upon the affirmance of a judg-

Foot v. Berkley, 1 Vent. 88.

ment in ejectment, where execution was executed as to the *damages and costs*, previous to the bringing of the writ of error, though not as to the *term*.

The Earl of Pembroke v. Bostock, B. R. M. 5 Car. Cro. Car. 173.

And if execution be executed only in part, costs shall be proportionably diminished. As where the judgment in a *quare impedit* was affirmed upon a writ of error, the Court, although the value was found in the verdict to be 100 *l.* *per annum*, would give no more than 60 *l.* damages, and 20 *l.* costs, because the defendant in error had obtained a writ to the bishop, in consequence of which his clerk had been admitted, and continued in possession for upwards of half a year, until removed by writ of restitution.

The words of the statute of 3 *H.* 7. c. 10. do not restrict the right of a defendant in error to costs, to any particular actions, but are general, that—"where a writ of error is "brought *before execution*, and *in delay of execution*, the "defendant in error shall have costs and damages, if the "judgment be affirmed, the writ of error discontinued, or "the plaintiff nonsuited." Hence it has been doubted, whether the legislature intended to give costs in a writ of error, in *every species of action*, upon affirmance of the judgment, &c. in case the writ of error was brought prior to the execution, and in obstruction thereof,—or only upon writs of error, where costs were recoverable in the *original* action. This question has been frequently agitated, and variously determined; but it should seem now to be established, by the greater weight of authorities, that costs *are* recoverable in every writ of error where the judgment is affirmed, although

none were recoverable in the original action. This proposition is supported by both the more ancient and modern decisions;—which I shall proceed to consider.

A WRIT of error being brought upon a judgment in an action of *quare impedit*, and the judgment affirmed, the Court, upon a suggestion that no execution had been executed in the first action, assessed damages and *costs* for the defendant in error, the plaintiff below, pursuant to the 3 *H.* 7. c. 10.; and this, notwithstanding, costs are not recoverable in a *quare impedit*. Henslow v. Bp. of Salisbury, M. 6 Ed. 6. B. R. Dy. 76. b. pl. 34. Acc. Gilb. H. C. P. 275.

THE last case was expressly recognized in a subsequent decision, where, upon the affirmance of a judgment in a *quare impedit*, the defendant in error was allowed both damages and *costs*. And a similar adjudication was made in the case of the Earl of *Pembroke* v. *Bostock*. Anon. M. 4 Car. 1. B. R. Cro. Car. 145. M. 5 Car. 1. Cro. Car. 174. Vide 3 Burr. 1511.

IN another case, where the judgment, in an action of *quod permittat prosternere*, had been affirmed in error, the question was, whether the defendant, in this writ of error, was entitled to costs under the 3 *H.* 7. First, because no costs were recoverable in the original action;—secondly, for that there was not any execution to be had, but only an abatement of the nuisance; and, thirdly, because it appeared, that the writ was not sued for delay, but upon a doubtful matter, which had been oftentimes argued before the Court. But, notwithstanding these reasons, it was resolved, that costs are allowable in every case where a writ of error is brought before execution sued. But it is in the discretion of the Penruddock v. Clerk, B. R. P. 41 Eliz. Cro. Eliz. 659.

Court what costs shall be allowed; though they cannot deny them altogether. Wherefore it was adjudged that the plaintiff in the writ of error should pay costs.

Graves v. Short, B.R.M. 40 and 41 Eliz. Cro.Eliz. 616.

So where a judgment in the Common Pleas in a *formedon* was affirmed upon error brought in the King's Bench, it was resolved that, as the words of the 3 *H.* 7. c. 10. are general, and do not mention any particular action, the defendant in error should have costs for the delay of execution, although, in the first action no costs were recoverable.

Ferguson v. Rawlinson, B.R.H. 11 G. 1. Andr. 113: S. C. 2 Str. 1084.

And this construction of the statute of 3 *H.* 7. is confirmed by a modern determination. The case was error upon a judgment given for the plaintiff in C. B. in a *qui tam* action, upon the statute of Usury, 12 *Anne*, c. 16. And the judgment being affirmed, a motion was made, on the behalf of the defendant in error, for costs under 3 *H.* 7. Against the motion it was urged, that, as the plaintiff would not have recovered either damages or costs in the original action, but only the treble value, he was not entitled to any costs upon the writ of error.

There being a contrariety in the books as to the present question, the Court took time to advise. And the last day of term Lee, *Chief Justice*, said, notwithstanding the cases which had been cited against costs, the Court were unanimously of opinion, that the defendant in error ought to have his costs. And this by the express words of 3 *H.* 7, which are not "in delay of execution *for damages*,"—but "in delay "of execution," generally. And it was the stronger by

reason of the 8 and 9 *W.* 3. c. 11. which gives costs to a defendant, where judgment is given for him, and affirmed in error.

But the doctrine laid down in the foregoing decisions, stands contradicted by two cases, in which it was holden, that no costs are recoverable in a writ of error, where none were recoverable in the first action.

Thus, a judgment in an action of *formedon*, in remainder, given for the demandant in the Common Pleas, being affirmed on error brought in the King's Bench, it was resolved, that, forasmuch as there were no costs or damages recovered or allowed in the first action, there could be no delay of execution by the writ of error, except as to the land; and, therefore, the defendant was not entitled to costs by the 3 *H.* 7. c. 10. Smith v. Smith, B. R. M. 10 Car. Cro. Car. 425.

So where a writ of error was brought to reverse a common recovery suffered in a court of great sessions in *Wales*, and, judgment being affirmed, the defendant in error moved for costs according to the 3 *H.* 7. On the authority of the case of *Smith* v. *Smith*, *supra*, the Court rejected the motion, because there were neither costs nor damages in the original action. But the reason assigned for the judgment, in the report in *Raymond*, is, that as no real execution was had in a common recovery, the writ of error could not be said to be *in delay of execution*. And in *Keble* it is said, the Court agreed, that where *execution is delayed* by a writ of error, costs are due, though no costs in the original action. Winne v. Lloyd, B. R. 16 Car. 2. 1 Lev. 146. S. C. Raym. 134. 1 Keb. 809. 914.

HOWEVER, neither of these cases can, perhaps, at this day, be considered as any authority, since they were both decided prior in point of time to the resolution in *Ferguson* v. *Rawlinson*.

Legge v. Richards, B.R. M. 22 Car. 2. 1 Mod. 77. S. C. 1 Vent. 166.

IF an executor bring a writ of error upon a judgment against his *testator*, the defendant below, and the judgment be affirmed, he shall not pay costs; because an executor is not within the statute for payment of costs *occasione dilationis*.

Gale v. Till, B. R. M. 5 W. & M. 4 Mod. 244. S. C. Carth. 281. Comb. 228. 3 Lev. 375. Skin. 400.

So an executor shall not pay costs, where he brings a writ of error upon a judgment against himself in an action, where he sued (1) *as executor*, although the judgment may be affirmed.

B. R. P. 10 G. 2. B. R. H. 367. S. C. 2 Str. 1072.

AND in *Saltern* v. *Wynne* (2) it was laid down, generally, that an executor is not liable by law to pay costs upon the affirmance of a judgment upon a writ of error.

(1) In the report of *Gale* v. *Till* in *Comb.* it is stated that the writ of error was brought by the *plaintiff* in the action below, who sued *as administrator* (or executor;) but according to *Carthew*, *Till* brought the action in C. B. *against Gale*, as administrator of T. S.; so that this book makes the writ of error to be brought by the *defendant* in the original action. This point is not clearly ascertained by the reports of the same case, in *Skinner*, *Levinz*, and *Modern*, though the general bearing of these books seems to be in favour of *Carthew*'s representation of the matter. If that should be the true one, the case is overruled by *Williams* v. *Riley*; on the other hand, should *Comberbach*'s statement be accurate, it falls, precisely, within the distinction laid down at the bar, and confirmed by the Court, in the last mentioned case.

(2) According to *Strange*, 1072. the writ of error, in *Saltern* v. *Wynne*, was brought by the executor upon a judgment *against his testator* upon a bond; but in Cas. *temp.* Hardw. the executor himself is stated to have been the defendant in the original action.

BUT if judgment be given below, against an executor, *de bonis propriis*, and that judgment be affirmed in error, he shall pay costs.

THEREFORE, where an executor brought a writ of error on a judgment, charging him with a *devastavit*, and the judgment was affirmed, the Court ordered the master to tax the costs of the defendant in error. And Lord HARDWICKE said, there was no distinction between executors and other persons, when defendants, as to costs in original actions; though where an executor was plaintiff, he was distinguished out of the statutes. Here, in the first judgment, he is to pay damages out of his own estate, then why shall he not on a writ of error?

Caswell v. Norman, B.R. P. 7 G. 3. 2 Barnard, K. B. 450.

S. C. 1 H. B. 567. n. (a) 2 Str. 977.

AND in a very recent case, in the Exchequer-chamber, it was determined, that executors and administrators are liable to costs upon a writ of error, where they would be liable to costs in the original action.

JUDGMENT *de bonis testatoris* having been given in the Court of King's Bench against the plaintiffs in error, on a verdict in an action of *assumpsit* against them as executors, and that judgment affirmed (without argument), in the Exchequer-chamber, the clerk of the errors allowed costs to the defendant in error.

Williams and another, executors, v. Riley. In Cam. Scacc. H. 31 G. 3. H. Bl. 566.

IN consequence of this, *Wilson* moved for a rule to shew cause why the costs should not be disallowed, on the ground that where executors and administrators were plaintiffs in

error, especially on a judgment *de bonis testatoris*, they were not liable to costs.

Le Blanc, Serjeant, opposed the motion in the first instance, contending that where executors and administrators were liable to costs in the original action, they were also liable if error were brought on the judgment; that, as they were defendants in the original action, in the present instance, they were liable to costs in that action, and that liability continued in error. The judgment here, as to the costs is, *de bonis testatoris, et si non, de bonis propriis*; with respect to costs, therefore, the executors stand in the same situation as any other person.

The Court took time to advise, and on a subsequent day Lord Loughborough declared the unanimous opinion of the Court, that the distinction taken in the argument by *Le Blanc* was well founded, and conformable to a case on the same subject, which the Court of Exchequer-chamber decided about three years ago; and, therefore, the clerk of the errors had done right in allowing costs in the present instance. Rule refused.

11 Mod. 89. 1 Lill. Pract. Reg. 475. A.

Where the plaintiff in error is *barred*, the defendant in error, it is said, shall not recover costs. As where the defendant in error pleads a release of errors, which is found for him, he cannot have costs, because the judgment below is not to be affirmed, but the judgment is, that the plaintiff be barred of his writ of error, and therefore this is neither nonsuit, discontinuance, nor judgment affirmed, as the 3 *H.* 7.

requires.—But in *Aston*'s Ent. 332. where the defendant in error pleaded a release of errors, which release was confessed by the plaintiff in error, the entry is, that the judgment below be *affirmed*, and costs are awarded to the defendant in error for delay of execution.

It should seem that costs are recoverable upon a writ of error, although the affirmance of the judgment be not upon the merits, but by the consent of the plaintiff in error.

THUS, judgment having been given for the defendants, on a special verdict in an action of ejectment, in the Court of Common Pleas, a writ of error was brought thereon in the King's Bench; and two of the judges, of the latter court, being of opinion that the judgment below was erroneous, and ought to be reversed, and the other two being of a contrary opinion, no rule could be made. But in order to accelerate the discussion of the question in the House of Lords, where the parties were anxious that it should be determined, the Court, at the request of the plaintiff's counsel, affirmed the judgment below; and in the rule for the judgment, the division among the judges was recited, and the consent of the party declared to be the sole reason of the affirmance. Whereupon a motion was made on the behalf of the plaintiff in error, that, as this was not an affirmance upon the merits, the Court would give some directions as to the costs; but they refused to interfere, saying, that it must take the common course of an affirmance. (1)

Thornby v. Fleetwood, B. R. T. 6 G. 1. 1 Str. 383.

(1) But the defendants in error were afraid to take the costs, wherefore the judgment of affirmance was entered up in the common form, but without costs.

1 Lill. Pr. Reg. 475. I.

ERROR in fact was tried, and a verdict was found for the defendant in error, and costs were ordered to be taxed by the 3 *H.* 7. c. 10.

B.R.H. 2 and 3 W. and M. Salk. 205. S. C. 4 Mod. 7. Carth. 179. But see now 8 and 9 W. 3. c. 11.

ALTHOUGH a defendant in replevin is, in some cases, considered as a plaintiff, yet in *Coan* v. *Bowles* it was adjudged, that an avowant is not a plaintiff within the meaning of the 3 *H.* 7. c. 10. so as to be entitled to costs, under that statute, upon the affirmance of a judgment in his favour, on a writ of error brought by the plaintiff in the original action.

A DEFENDANT in error is entitled to costs, where the writ of error is quashed, although no costs were recovered in the original action.

Archbishop of Dublin, and Dean of Dublin, B. R. H. 6 G. 1. 1 Str. 262.

As where the defendant in a prohibition had obtained judgment in *Ireland*, which was affirmed in B. R. there, and brought over hither by a defective writ of error, which was quashed, the question was, whether the defendant in error should have costs, there being none given in the courts below, either on the principal judgment, or on the affirmance?

FOR the plaintiff in error, it was said, the construction of the 3 *H.* 7. c. 10. had been, that, where there were no costs in the original action, there should be none in the writ of error; and the 4 and 5 *Anne*, c. 16. extends only to cases where the defendant in error would have had costs on affirmance. And in *Harrison* v. *the Archbishop of Dublin*, 10 *Anne*, in prohibition, there was judgment for the defendant in C. B. in *Ireland*, that judgment affirmed in the King's Bench there, and also in this court, and afterwards in the

House of Lords, and no costs ventured to be taken, though able counsel had considered the case.

On the other hand, it was argued, that though no costs had been given below in this case, yet there might have been costs on 8 and 9 *W.* 3. c. 11. (which it was shewn was enacted in *Ireland*) and, therefore, the neglect of taking them in one court, ought not to prejudice the party in another. And in *Hyde* v. *Hallagan*, which was replevin in C. B. in *Ireland*, judgment for the avowant, and affirmed in B. R. and brought over hither; and because the first writ of error from C. B. to B. R. was defective, this court reversed the affirmance, and gave such judgment as B. R. below ought to have done, viz. to quash the writ of error, and, after several motions, costs were ordered to be taxed.

Pratt, *Chief Justice*.—The authorities on 3 *H.* 7. being both ways, I think myself at liberty to go into those which seem to me to be grounded on the best reason, and those are such as give costs; for indeed the others, which are built upon the words *delay of execution*, stand upon a very slender foundation. Suppose there were no costs in the original suit, yet is there not a manifest delay to the party? For after a long race, when he reaches a consultation, he is but in the same condition, as to the forwardness of his suit in the inferior court, as when he first set out to defend himself against the prohibition. The defendant might have had costs below, and I think he is entitled to them here. And by Fortescue, *J.*—The statute has the word *vexation*, as well as *delay of execution*; and will any body say, here is not a manifest vexation to the party, to be travelled thus far from one court

to the other, and to have the merits of his cause so long suspended from being determined in the inferior court?

Curia advisare vult, and afterwards in *Trinity* Term, 6 *Geo.* 1. the *Chief Justice*, (PRATT) delivered the opinion of the Court, that costs should be paid.

Ginger v. Cowper and another, B. R. T. 11 G. 1. 2 Ld. Raym. 1403. S.C. 1 Str. 606. 8 Mod. 316. S. P. Ratcliffe v. Burton, B. R. T. 8 G. 2. B. R. H. 135.

IF one of two defendants, against whom judgment has been given in the Common Pleas, bring error alone in the King's Bench upon this judgment, and the writ of error be quashed, on motion, because both the defendants below did not join in it, the defendant in error shall not only have the costs of the motion for quashing the writ of error, but costs in the same manner, as if the judgment had been affirmed, and this by the express words of the 4 and 5 *Ann.* c. 16. s. 25.

Rejindoz v. Randolph, B. R. P. 2 G. 2. 2 Str. 834.

IT is clear that a plaintiff in error is liable to costs, where the writ of error is quashed through his own laches. As where a writ of error was quashed, because returnable before judgment given; it appearing to be the fault of the plaintiff in error in using the writ, after he knew it was spun out, by his own motion in arrest of judgment. But if the cause of quashing a writ of error originate in the voluntary act of the defendant in error, the plaintiff is not subject to the payment of costs; but on the contrary, the Court will, probably, in such case, compel the defendant in error to pay costs to the plaintiff.

Gould v. Coulthurst, B. R. M. 5 G. 1. 1 Str. 139.

THUS, where a writ of error was tested in *Hilary* Term, of which the judgment was; the plaintiff below entered con-

tinuances upon it till *Trinity* Term, which occasioned the writ of error to be quashed. And now the question was as to the costs:—And all the Court agreed, that this not being a fault in the writ of error at the time of bringing it, but being occasioned by the act of the defendant in error, which the plaintiff could neither foresee nor prevent, it was not a case within the 4 *Ann.* c. 16. Upon which another question arose, whether the plaintiff in error should not have his costs in this case, being defeated of the benefit of his writ of error by the artifice of the defendant in error? But the Court being divided on this latter question, the *Chief Justice*, (PRATT) and EYRE, *Justice*, being against giving costs, and POWYS and FORTESCUE, *Justices*, of the contrary opinion, the writ was quashed without costs on either side.

HOWEVER in the case of *Rejindox* v. *Randolph*, above cited, the Court are stated to have said, they would have made the defendant in error pay the costs, if it had appeared, that he had entered continuances on purpose to defeat the writ of error. 2 Str. 834.

BUT notwithstanding the quashing of a writ of error may be occasioned by the act of the defendant in error, if such act do not appear to be reprehensible, the Court will not make him pay the costs in error.

THEREFORE, where it appeared, upon a rule to shew cause, why the costs of a writ of error should not be paid by the plaintiff in the original action, that he had obtained a verdict, and taxed costs; that judgment was signed, but not entered Cooper v. Robins, B. R. T. 13 G. 3. Say. on Costs, 207.

upon the roll; and that he had, after suing out of the writ of error (apprehending that it was brought on account of an excess of damages,) entered a *remittitur* as to part of the damages, the Court held that the plaintiff had a right to enter a *remittitur* as to part of the damages, at any time before judgment was entered upon the roll; and, consequently, the bringing of the writ of error was premature. Rule discharged.

IF the judgment in the original action be reversed in error, no costs are payable on account of the writ of error.

Wyvil v. Stapleton, B. R. M. 11 G. 1. 1 Str. 617. S. C. 8 Mod. 315.

THUS, a writ of error being brought upon a judgment for the defendant in the original action, and the judgment reversed, the plaintiff insisted on full costs to that time, the statute of *Gloucester*, c. 1. extending to all costs consequent of the suit.

BUT by the Court.—At common law there were no costs upon any writ of error, and the 3 *H.* 7. and 8 and 9 *W.* 3. c. 11. extend only to the case of an affirmance of a judgment, and that very reasonably; for why should any man in the case of a reversal pay costs for the error of the court below? We are, in this case, to give such judgment as the court below should have given, that is, judgment for the plaintiff, with his costs to that time. Therefore let the master only tax the plaintiff such costs as he would have been entitled to in the original action.

2 Burr. 1097.

THE House of Lords, upon a writ of error returnable in

parliament, exercise a discretionary power with respect to the allowance of costs; and sometimes give very large, sometimes very small costs, according to the nature of the case, and the reasonableness, or unreasonableness of litigating the judgment of the court below. And these costs are, generally, comprised in one gross sum.

In the court holden before the lord chancellor, lord treasurer, and judges (under 31 *Ed.* 3. c. 12.) for examining erroneous judgments in the Exchequer, costs are given by the lord chancellor, or lord keeper, personally. And upon the affirmance of a judgment in this court, the practice is, for the attorney of the prevailing party, to draw out a bill of the costs occasioned by the writ of error and the subsequent proceedings; upon which bill the lord chancellor signs his *allocatur*. And, on such occasions, his lordship in order to compensate for the damage sustained by the delay of execution, usually makes very liberal allowances. Burt. Exch. 331.

On error in the Exchequer-chamber, before the judges of the Common Pleas and barons of the Exchequer, the course is for the proper *officer* to settle the costs, unless any particular direction be given by the Court; and, in taxing them, he allows *double* (*a*) the money out of pocket, or thereabouts. 2 Burr. ubi supra.

(*a*) Sed quære, for this was when the Court of Exchequer-chamber allowed *no* interest, but in several late instances, that court has allowed interest on the sum recovered by the judgment below.

In the Court of King's Bench, upon writs of error from the Common Pleas, and other inferior courts of record, the officer taxes the costs of affirmance, in the same manner, as he taxes other costs, though somewhat more liberally.

SECT. III.

Of Costs in an Action of Waste.

2 Inst. 299. Co. Litt. 53. b.

(a) Sed vide Reg. 72. 2 Inst. 145. 301. Bro. Abr. Tit. Waste, pl. 88.

By the common law, an action of waste was maintainable against three persons only, tenant in dower, guardian in chivalry, and tenant by the curtesy; (a) because the estate of such tenants being created by the act and operation of the law, it was but reasonable that the law should afford a remedy against them for the commission of waste, during their respective possessions. And in this action, the plaintiff recovered damages according to the nature of the injury which he had sustained.

2 Inst. 145. et ubi supra. Co. Litt. 53. b. 54. a.

But a tenant for life, or for years, was not punishable for waste, by the ancient common law, and the reason was, that they came in by the demise and lease of the owner of the fee, and therefore he might have provided by condition, covenant, or otherwise, against the committing of waste by his tenant or lessee; and, if he omitted to do so, it was his own default. But by the statute of *Marleberge*, 52 *H.* 2. c. 23, all farmers (under which term are comprehended all such as hold by lease for life, or lives, or for years, by deed or without deed,) were prohibited to commit waste, under the penalty of yielding full damages, and being grievously amerced. And by the statute of *Gloucester*, it is provided that a writ of waste may be had out of Chancery, not only against tenants by the law of *England* (or curtesy,) and those in dower,

2 Inst. 145.

6 Ed. 1. c. 5.

but against any other that holds in any manner for term of life, or years; and he that shall be attainted of waste, shall forfeit and lose the thing (i. e. *place*) which he hath wasted, and treble damages, to him that hath the inheritance.

Costs to be recovered in actions of waste.

WITH regard to costs in this action, it is enacted by 8 and 9 *W.* 3. c. 11. s. 3. "That in all actions of waste, *wherein* the "*single damage, found by the jury shall not exceed the sum* "*of twenty nobles*, the plaintiff obtaining judgment or any "award of execution, after plea pleaded, or demurrer joined "therein, shall likewise recover his costs of suit; and if the "plaintiff shall become nonsuit, or suffer a discontinuance, "or a verdict shall pass against him, the defendant shall re- "cover his costs, and have execution for the same by *capias* "*ad satisfaciendum*, *fieri facias*, or *elegit*."

UPON this statute rests the law of costs, at this day, in actions of waste against a tenant for life or for years. Formerly no costs could have been recovered in waste against either of them, because, whatever waste such persons might have committed at the common law, no action could be brought for the recovery of *damages*; and the statute of *Gloucester*, c. 5, which renders them liable, on conviction of waste, to the forfeiture of the place wasted, and treble damages, contains no provision as to costs.

BUT, as *damages* were recoverable, by the ancient common law, against a tenant in dower, by the curtesy, or a guardian, *costs* were always recoverable by the plaintiff in an action of waste against any of these tenants, since the statute of *Glou-*

cester, c. 1. And hence it follows, that where a plaintiff fails in an action of waste against a tenant in dower, by the curtesy, or a guardian, the defendant, in every such case, has a right to costs under the 4 *Jac.* 1. c. 3. which, as we have often had occasion to observe, entitles a defendant to costs, wherever the plaintiff would have recovered them, in case he had succeeded in his action. But the statute of 4 *Jac.* 1. did not operate to give costs to either a tenant for life, or for years, though the plaintiff failed in an action of waste against either of them, because there, the plaintiff himself had no right to costs on a recovery, previous to the 8 and 9 *W.* 3. c. 11.

Vide post.

In an action of waste against a tenant by the curtesy, or in dower, the plaintiff is entitled to recover *treble costs*, as well as treble damages; because the single damages, recoverable in waste against these persons, at common law, being trebled by the statute of *Gloucester*, c. 5, the costs, as parcel of the damages, shall be also trebled.

SECT. IV.

Of Costs in an Action of Debt for not setting out Tithes.

Bro. Tit. Dismes, pl. 5. 6. 9. 10. 2 Co. 44. a. Cro. Eliz. 512. Vaugh. 195. 2 Inst. 648.

At the common law, there was no other remedy against a person who had neglected to set out, or pay his tithe, than by suit in the ecclesiastical courts; and only spiritual persons could sue in the spiritual courts for subtraction of tithe, for laymen were, formerly, incapable of acquiring any right to tithe, which was deemed an ecclesiastical inheritance. But

as laymen, soon after the dissolution of the monasteries, in the reign of King *Henry* the Eighth, became possessed of estates or interests in tithes, the statute of 32 *H.* 8. c. 7. enables them, as well as spiritual persons, to sue for the subtraction thereof in the spiritual courts. And by 2 and 3 *Edw.* 6. c. 13. it is enacted, that no person shall take or carry away his predial tithes (*viz.* of corn, hay, or the like,) before the tenth part be duly set forth, or agreement made with the proprietor of such tithes, under the pain of forfeiture of treble value of the tithes so taken, or carried away. And the treble value of the tithes, so subtracted or withheld, may be sued for in the temporal courts.

FORMERLY in an action of debt upon the statute, for not setting forth tithes, neither the plaintiff nor defendant was entitled to any costs of suit. The plaintiff, in such an action, was not, because it did not lie in the temporal courts, previous to the 2 and 3 *Edw.* 6. c. 13, and that statute makes no mention of costs. And it was holden, that the defendant in an action of debt upon the statute for tithes, was not entitled to costs under the 23 *H.* 8. c. 15. because such action is not an action of debt within that statute. And as the plaintiff had no right to costs, on a recovery in this action, the defendant could not have costs, although a verdict passed for him, under the 4 *Jac.* 1. c. 3. 2 Inst. 651. Noy. 136.

BUT by the 8 and 9 *W.* 3. c. 11. s. 3. it is enacted, "That "in all actions of debt upon the statute, for not setting forth "of tithes, wherein the single value found by the jury shall Costs to be recovered in actions of debt for not setting out tithes.

" not exceed the sum of twenty nobles, (1) the plaintiff ob-
" taining judgment, or any award of execution after plea
" pleaded, or demurrer joined therein, shall likewise recover
" his costs of suit; and if the plaintiff shall become nonsuit, or
" suffer a discontinuance, or a verdict shall pass against him,
" the defendant shall recover his costs, and have execution
" for the same by *capias ad satisfaciendum*, *fieri facias*, or
" *elegit*."

1 Lill. Pract. Reg. 469. a. Barnes, 150.

IF, in an action of debt for not setting forth of tithes, the single value found by the jury, *exceed* twenty nobles, the plaintiff is not entitled to costs, for then the matter is purely as it stood before the statute of 8 and 9 *W.* 3. c. 13.

AND to enable a plaintiff to recover costs in this action, the single value of the tithes not set out, must have been *found by a jury*, not to exceed twenty nobles.

Barnard v. Moss, C. B. H. 29 G. 3. H. Bl. 107.

THUS, in an action of debt on the stat. 2 and 3 *Edw.* 6. c. 13. to recover treble the value of tithes not set out, the defendant demurred to the declaration, which besides counts for the penalty, contained a count for the single value. But the parties afterwards agreed to submit to arbitration, and judgment was entered, to stand as a security for costs. The arbitrator determined the single value of the tithes to be 6*l.* 7*s.* 6*d.* and awarded treble that sum to the plaintiff, viz. 19*l.* 2*s.* 6*d.* together with the costs of the reference, and that he might sue out execution.

(1) A noble is 6*s.* 8*d.* and twenty amount to 6*l.* 13*s.* 4*d.*

A MOTION was now made, that the prothonotary might tax the costs of suit to the plaintiff, under the 8 and 9 *W.* 3. c. 11.

THE motion was opposed on the ground, that the plaintiff was not entitled to any costs of suit, unless the single value or damages had been *found by a jury*, the words of the statute being positive; and a case of *Biddulph* v. *Cooper*, in this court, *Hil.* 23 *Geo.* 3. was cited; which was an action for not setting out tithes, on the 2 and 3 *Edw.* 6. c. 13.; the plaintiff declared for less than 20 nobles, and signed judgment for want of a plea, after which he applied to the prothonotary to tax his costs. They consulted Mr. *Justice* GOULD, who informed them, that as no trial or inquisition was had by a jury, the plaintiff was not entitled to costs.

AND the Court held, that the statute was confined to the case of the single value or damages being found *by a jury*, and, therefore, refused the rule, as far as it respected the counts for the penalty, but allowed the costs to be taxed on the count for the single value.

SECT. V.

Of Costs in a Suit upon a Writ of Scire Facias.

A *Scire Facias* is a judicial writ, and grounded, regularly, on some matter of record, as judgments, recognizances, and letters patent, on which it lies either to enforce their execution, or to vacate, or set them aside. But it is said that, in Co. Litt. 290. b. 4 Bac. Abr. 409. 2 Inst. 470.

many cases, a *scire facias* is granted partly upon a record, and partly upon such a suggestion, without which no proceeding could be upon the record.

2 Inst. 469. DIFFERENT opinions have been entertained, whether, in case excution was not sued out within a year and a day after the entry of the judgment, a *scire facias* lay, at the common law, to revive such judgment. But this doubt, says Lord *Coke*, arose for want of distinguishing between *personal*, and *real* actions. If, continues his lordship, the plaintiff, in a personal action, after judgment given, or recognizance acknowledged, sued out no process of execution within the year, he could, at common law, have had no *scire facias*, but the plaintiff, or conuzee, was driven to his new original upon the judgment or recognizance. But in real actions, or upon a fine levied, though the demandant, or conuzee, sued out no execution within the year, after the judgment given, or fine levied, yet after the year a *scire facias* lay for the land, &c. And the reason of the diversity was, that, in real actions, the plaintiff could not have had a new original upon the judgment, and therefore without a *scire facias* he could have had no advantage from his judgment; but in a personal action he might have brought an action of debt upon the judgment. But now in *personal* actions, a writ of *scire facias* is given by the stat. of *Westminster* 2. 13 *Ed.* 1. c. 45. where execution has not been sued out within a year and a day after the entry of the judgment. However this statute, being in the affirmative, restrains not the common law, but the party may still maintain his original action of debt by the common law, or have a *scire facias*, pursuant to the act, at his election.

2 Inst. 469. 470. Co. Litt. 290. b. 291. a. 3 Mod. 189. 4 Mod. 248. 7 Mod. 64. Skin. 682. Sed vide Salk. 600. 2 Ld. Raym. 808.

2 Inst. 472.

A *scire facias* is reputed in law to be in the nature of an action; for although it be denominated a *judicial* writ, yet the defendant may *plead* upon it; and every writ, to which the defendant may plead, whether judicial or original, is in law an action. Therefore a release of all actions, or of all executions, is a good bar, in a *scire facias*; and according to the opinion of *Littleton*, a release of all actions, is a good plea in bar to a writ of *scire facias* upon a fine.

Litt. Sect. 505. 506. Co. Litt. 290. b. 291. a. Doctr. Pl. 330. Comb. 455. 3 Mod. 189.

As no damages are recoverable in a suit upon a writ of *scire facias*, no costs were recoverable therein previous to the statute of 8 and 9 *W.* 3. c. 11. The third section of which enacts,—"That in all suits upon any writ or writs of *scire* "*facias*, the plaintiff, obtaining judgment, or any award of "execution, after plea pleaded, or demurrer joined therein, "shall likewise recover his costs of suit; and if the plaintiff "shall become nonsuit, or suffer a discontinuance, or a ver- "dict shall pass against him, the defendant shall recover his "costs, and have execution for the same by *capias ad satis-* "*faciendum*, *fieri facias*, or *elegit*."

Str. 807. 2 Ld. Raym. 1532. 3 Burr. 1791. Latch, 101. 3 Bulstr. 322. 1 Lill. Pr. Reg. 472. C.

It has been adjudged, that this statute does not extend to *executors* or *administrators*; therefore, if the plaintiff or defendant, in this action, sue, or be sued in that capacity, he is not liable to costs.

Bellew v. Aylmer, B. R. T. 5 G. 1. 1 Str. 188. Smith v. Harmer, 1 Lill. Pr. Reg. 475. G.

Neither are any costs payable, where a writ of *scire facias* is quashed, before plea pleaded; or abated by plea.

As where, upon a motion by the plaintiff to quash his own

Huer v. Whitebread, M. 6 G. 2.

Cas. Pr. C. P. 74. S. C. Pract. Reg. 378. S. P. Pool v. Broadfield, M. 8 G. 2. Cas. Pr. C. P. 109. S. C. Pract. Reg. 378. Barnes, 431.

scire facias, the defendant insisted upon costs, alledging that he had entered an appearance, and thereby incurred expence; it was determined that costs were never due in proceedings upon a *scire facias*, until a declaration was delivered, and the defendant had pleaded.

Pocklington, v. Peck, M. 12. G. 1. B. R. 1 Str. 638.

In another case, the plaintiff moved for leave to quash a writ of *scire facias*, the defendant having pleaded thereto in abatement, which was granted without costs. And by the Court—It is the same in a *scire facias* as in an action, where you plead in abatement, and the plaintiff's writ is abated, he pays no costs. But they added, that, if there had been no plea in abatement, and the party had moved to quash his own writ, they would have made him pay costs.

Sed vide supra.

SECT. VI.

Of Costs in Prohibition.

2 Ro. Abr. 281. 4. Inst. 71. Bro. Tit. Prohibition, pl. 6. 1 P. Wms. 476. 4 Inst. 81, 99, 100. 12 Co. 58, 108. Bro. Tit. Consultation, pl. 3. Palmer, 523. 2 Brownl. 17.

The writ of prohibition was in use so early as the reign of King *Edward* the First, and is a writ issuing properly out of the Court of King's Bench, being the king's prerogative writ; but, for the furtherance of justice, it may now also be had, in some cases, out of the Court of Chancery, Common Pleas, or Exchequer; directed to the judge and parties of a suit in any inferior court (whether such court be temporal, ecclesiastical, maritime, military, &c.), commanding them to desist from the prosecution thereof; and is granted upon a suggestion, entered upon record, that such inferior court has assumed juris-

diction of a matter not legally cognizable therein; or that it has, in any particular, exceeded the powers entrusted to it by the laws and statutes of the realm.

THE reason of prohibitions being only to restrain inferior courts within the bounds of the jurisdiction respectively allotted to them by law, the granting of them does not import that the ecclesiastical, or other inferior temporal courts, are *alia* than the king's courts, but signifies that the cause is drawn *ad aliud examen* than it ought to be; and therefore it is always said in the prohibitions (be the court ecclesiastical or temporal to which they are awarded), that the cause is drawn *ad aliud examen contra coronam et dignitatem regiam.* 2 Inst. 602.

MANY of our judges have been of opinion, that prohibitions are grantable *ex debito justitiæ*; while others, on the contrary, have strenuously maintained, and which seems to be the better opinion, that the awarding or refusing a prohibition is a discretionary act in the court; by which, however, must be only understood, that the superior courts are at liberty, under the circumstances of the case, to exercise a *legal* discretion in this point; but not an arbitrary one, in refusing prohibitions, where in such like cases they have been generally granted, or where by the laws and statutes of the realm they ought to be granted. 1. Sid. 65, 178. Raym. 3, 4. 92. 4 Burr. 1950. Hob. 67. Salk. 33. 1 Ld. Raym. 578. Holt, 595. Comb. 148. 2 Inst. 607. 4 Bac. Abr. 242. Wynch, 78.

IF either the judge or party proceed after a prohibition has been granted, they are punishable by attachment for the contempt, at the discretion of the court that awarded it; and an F. N. B. 40. 2 Ro. Abr. 281. l. 14. 3 Bl. Comm. 113. B. N. P. 218.

action will lie against them, to repair the party injured in damages.

B. N. P. 218. 3Bl.Com. 113. WHEN a prohibition is moved for, the method is, for the party aggrieved in the court below to file a suggestion in court, setting forth the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction, or manner of process, disallowed by the laws of the kingdom; upon which the court grants a rule for the other party to shew cause why a writ of prohibition should not issue; and if, upon shewing cause, it appear to the court that the surmise is not true, or not a competent ground for restraining the inferior jurisdiction, they will deny the prohibition; otherwise they will make the rule for it absolute. But if the point be too nice and doubtful to be decided merely upon a motion, the party applying for the prohibition is directed by the court to *declare* in prohibition; that is, to prosecute an action, by filing a declaration against the other, upon a supposition or fiction (which is not traversable) that he has proceeded in the suit below, notwithstanding the writ of prohibition.

Barnes, 148.

HAVING premised these few observations concerning the nature of, and mode of applying for, a writ of prohibition, I shall now proceed to shew in what cases costs are by law recoverable upon such writ, or the proceedings relating or incident thereto.

Every party suing for a prohibition to a

BY 2 and 3 *Edw.* 6. c. 13. s. 14. it is enacted, "That if "any party, at any time hereafter, for any matter or cause

" before rehearsed, (1) limited or appointed by this act, " to be sued or determined in the king's ecclesiastical " court, (2) or before the ecclesiastical judge, do sue for any " prohibition, in any of the king's courts, where prohi- " bitions before this time have been used to be granted, " then, in every such case, the same party, before any prohi- " bition shall be granted to him or them, shall bring and de- " liver to the hands of some of the justices or judges of the " same court where such party demandeth the prohibition, " the very true copy of the libel depending in the ecclesi- " astical court, concerning the matter wherefore the party " demandeth the prohibition, subscribed or marked with " the hand of the same party; and under the copy of the said " libel shall be written the suggestion wherefore the party " so demandeth the said prohibition: And in case the said " suggestion, by two honest and sufficient witnesses at the " least, be not proved true in the court where the said prohi- " bition shall be granted, within six months next after the " said prohibition shall be so granted, that then the party " that is letted or hindered of his or their suit in the eccle- " siastical court by such prohibition, shall, upon his or their " request and suit, without delay, have a consultation granted " in the same case, in the court where the said prohibition " was granted; and shall also recover double costs and da- " mages against the party that pursued the said prohi- " bition, the said costs and damages to be assigned or as- " sessed by the court where the said consultation shall be

suit in an ecclesiastical court, for tithes or offerings, shall, before any prohibition be granted to him, deliver to some of the judges of the court to which he applies, a true copy of the libel and suggestion.

And in case the suggestion be not proved by two sufficient witnesses within six months after the awarding of the prohibition, the party prohibited shall have, upon request, a consultation, and also double costs and damages, to be assessed by the court granting the consultation.

(1) The first section of 2 and 3 *Edw.* 6. c. 13. rehearses the statutes of 27 *H.* 8. c. 20. and 32 *H.* 8. c. 7.

(2) By the former part of the statute, all manner of *tithes* and *offerings* may be sued for in the ecclesiastical courts.

" so granted; for which costs and damages the party to whom " they shall be awarded shall have an action of debt, by bill, " plaint, or information, in any of the king's courts of " record, wherein the defendant shall not wage his law, " nor have any essoign or protection allowed or admit- " ted."

Litt. 19. Hob. 179. 2 Mod. 58.

IT has been adjudged, that the six months, allowed by this statute for the proof of the suggestion, shall be computed according to the *calendar*; for this being a computation which concerns the church, it is but reasonable that it should be made conformably to the ecclesiastical law.

M. 41 and 42 Eliz. B. R.

IN *Moore*, 573, it was holden, that the time of six months given by 2 and 3 *Edw.* 6. for proving the suggestion, ought to be intended six months in *term-time*, and that the vacation should not be deemed any part of the time. But this point has been since determined otherwise, and that the six months begin to run from the *teste* of the writ of prohibition. Though, where a declaration in prohibition had been ordered, by rule, to be made agreeable to the proceedings in the spiritual court, and thereupon a prohibition to issue, it was resolved, that the time for proving the suggestion should be computed from the *amendment*, and not from any earlier period.

2 Ld. Raym. 1172. Salk. 554. pl. 20.

Malton, v. Acklam, H. 20 G. 2. Barnes, 428.

Skinner's Case. Latch, 30. Vide Litt. 155.

AND if the suggestion be proved before one of the judges, within the six months, it is well enough, although it may not be recorded till after the expiration of that time; and such proof may be made during the vacation.

THE statute requires the suggestion to be proved by two honest and sufficient witnesses; therefore, where it appeared that the plaintiff in a prohibition had proved his suggestion by two persons who had both been attainted of felony, the court awarded a consultation. Brown v. Crashaw, 2 Bulstr. 154.

BUT it hath been held, that persons, such as parishioners of the parish, &c. who may not be sufficient witnesses at a trial at law, may notwithstanding be sufficient witnesses to prove the suggestion; the chief intent of the statute being to prevent frivolous and vexatious suggestions; also it hath been held, that after the admitting and recording the proof of the suggestion, nothing is to be objected against the persons of the witnesses, or against their evidence. Sharp v. Hobart, M. 29 Car. 2. C.B. 4Bac.Abr.246.

IF the plaintiff's proof of his suggestion be defective or insufficient, he may supply it by better, at any time within the six months, but not after. Stiddar v. Tilar. Litt. 155.

IN one book, it is said to be sufficient, where the suggestion consists of two parts, to produce one witness to each part. Robson'sCase. 1 Vent. 107.

As the 2 and 3 *Edw.* 6. c. 13. refers to the statutes of 27 *H.* 8. c. 20. and 32 *H.* 8. c. 7. which extend to all kinds of tithes, whether predial, personal, or mixed, and also to offerings, all such tithes and church duties as are mentioned in those statutes, are considered to be as much within this act, as if particularly enumerated. And, therefore, proof must be made, within six calendar months, of the truth of a suggestion 2 Inst. 662. Foy v. Lister. 2 Ld. Raym. 1172.

S.C. Salk. 554. Adm. Yelv. 102.

for a prohibition to the spiritual court, in a suit for *small* tithes, as well as for great.

Gippe's Case. Godb. 245. Pool v. Gardner. Carth. 463. Adm. Yelv. 102, 119. Noy, 148. Cro. Car. 208. Vid. 2 Show. 92.

PROOF of the suggestion is requisite in all cases, where the matter suggested is merely matter in fact; therefore, it hath been adjudged, that the suggestion of a *modus decimandi* ought to be proved within the time limited by the act.

Stroud v. Hoskins. Cro. Car. 208. S. S. C. 1 Jon. 231. Thomas v. Gifford. 2 Show. 92. Adm. Dy. 170. b.

So, where a suggestion stated, that the suit in the spiritual court was for tithes of heath, and barren ground, within seven years after the improvement, contrary to the statute, proof of the suggestion was held requisite.

Boocher v. Rogers. 1 Rol. Rep. 2.

So, where a suggestion was, that the lord of the manor of D. and all those whose estate he had, had been used from time immemorial to receive the tithes within that manor, for which he and they had been used to maintain a chaplain in the church of D.; because the plaintiff in the prohibition did not prove that part of his suggestion relating to the maintenance of the chaplain, within six months, but only the other part, a consultation was awarded.

Reynolls v. Hayes. 1 Ro. Rep. 55.

AGAIN, where one, who was sued in the ecclesiastical court for not setting forth tithes, suggested, for a prohibition, an arbitrament by which he was to pay so much, &c. it was resolved, that this suggestion, as well as one made of a *modus decimandi*, ought to be proved within six months, pursuant to the 2 and 3 *Edw.* 6. c. 13. And by COKE, CROKE, and DODERIDGE, *Justices*, a suggestion of a discharge of tithes, by virtue of the 31 *H.* 8. c. 13. ought likewise to be proved within the

Ibid. Acc. Congley v. Hall. 2 Ro. Rep. 125.

same time. But in 2 *Ro. Rep.* 125, the Court said, That *precise* proof of the latter suggestion was not necessary, but it would be sufficient, if it was sworn, that the lands had since the 31 *H.* 8. been always reputed to be discharged of tithes, or that that was the common report, *vel similia*; and Doderidge said, That he had known many precedents of proof being made in such manner. Acc. Noy, 28.

In one case, it is laid down, that proof of a suggestion by *hearsay*, is sufficient within the statute. And proof as the witness *thinks*, or *believes*, will serve. Bennett v. Snell. Palm. 377. Noy, 44. Litt. 155.

Although the suggestion be not proved strictly, nor with precise certainty as to all its circumstances, yet, if it be proved in substance, or in such a manner as to make it appear that the ecclesiastical court has not jurisdiction, it is enough.

As where a suggestion, for a prohibition to a suit for tithes, was, that the proprietor of the rectory of B. wherein the lands were, and all his predecessors, had had twenty acres of pasture, and twenty acres of wood, in satisfaction of tithes, and the proof was, that he had the twenty acres of pasture, but not of wood, the court held it to be well enough; for although the party had failed in proving his suggestion correctly as stated, yet he had proved the substance, and enough to shew that the spiritual court ought not to hold plea thereof. If the suggestion be that the parson holds a hundred acres of land in satisfaction of tithes, and the proof be that he holds only sixty acres in satisfaction thereof, it is good. Austen v. Pigot. Cro. Eliz. 736. S. C. Moore, 911.

Anon. Noy, 28.

So if one surmise, that the inhabitants of D. (of which he himself is one) have paid a *modus*, and the proof be that only he himself had paid it, this is sufficient; because it ousts the ecclesiastical court of it's jurisdiction.

And though the proof, upon the suggestion of a *modus*, vary from the *modus* set out, if it shew a good *modus* to deprive the spiritual judge of the cognizance of the cause, a prohibition shall be awarded. As where a *modus* was alleged to be that one should pay 4*s*. in satisfaction of tithes, and the proof was, that he should pay 4*s*. 6*d*. a consultation was denied.

Moore, 911. 2 Keb. 407. Dy. 171. a. Marg. Noy, 44. Hetl. 100. 110. Vide Yelv. 55. 2 Keb. 57.

But where a suggestion for obtaining a prohibition to a suit in an ecclesiastical court for tithes, is in the negative, no proof is required to be made thereof within six months by the 2 and 3 *Edw*. 6. c. 13. s. 14, because a negative cannot be proved. As if the proprietor of a parsonage impropriate sue for tithes, and the cause of the suggestion be, that the parsonage is *not* impropriate; or if the parson of *Dale*, sue for tithes of land in that parish, and the party, applying for a prohibition, suggest that the lands do not lie in that parish; or that the parson who sues for the tithes, was not inducted, &c.—in none of these cases, nor in any other, where the suggestion for a prohibition negatives a matter of fact, is it necessary to produce any proof; and therefore prohibitions upon causes in the negative, remain as at the common law.

2 Inst. 662.

2 Inst. 662.

So no proof is requisite, where the suggestion is grounded upon any matter of law, because matters of law are to be de-

cided by the judges, and not proved by witnesses. As if it be suggested, that the suit in the spiritual court is for the tithe of tiles or turf, or other thing, not titheable by law. Vide 2 Keb. 134.

And it hath been determined, that the statute of 2 and 3 *Edw.* 6. c. 13. s. 14. does not operate to require proof of a suggestion for a prohibition, within six months, where the ground of such suggestion is a composition or agreement with the parson for a satisfaction, in lieu of tithes. Woodward v. Bugg, 2 Leo. 29. S.C. 3 Leo. 257. Anon. Litt. 297. Tanner v. Small, Yelv. 102.

Neither is there any occasion to prove a suggestion, which is grounded upon a matter, that was not, at the time of making the statute of 2 and 3 *Edw.* 6. c. 13, a sufficient cause to have a prohibition, but has been made so by a subsequent statute. Wiggon v. Arscot, 2 Leo. 213.

It is said, if the party, who has obtained a writ of prohibition, be ordered to declare in prohibition, that he is not obliged to make proof of his suggestion within six months, pursuant to the 2 and 3 *Edw.* 6, because the proof is, in such case, to be made at the trial of the cause. Arg. in Creake v. Pitcairne, T. 13 G. 2. Cas. Pr. C. B. 158.

Double costs shall not be given for want of proving a suggestion, which is grounded upon a *modus decimandi*, and on a contract between the parties, because costs can be given only where the *whole* suggestion stands in need of proof; and here, though the *modus* requires proof, the contract does not, and the suggestion is entire. Cobb v. Hunt, H. 5 Jac. B. R. Yelv. 119. S. C. Brownl. and Goulds. 98.

The statute of 2 and 3 *Edw.* 6. c. 13. gives double costs

Hutton v. Barnes, B. R. M. 3 Jac. Yelv. 79.

to a defendant in prohibition, only where a consultation is awarded *in default of proving the suggestion within six months*, and for no other cause; therefore, it has been adjudged, that, if a consultation be granted for a *variance* between the libel in the spiritual court, and the suggestion;—

Per Coke, 1 Rol. Rep. 56.

or if a consultation be granted because no sufficient ground for a prohibition is set out in the suggestion;—no costs shall be given.

AND to entitle a person to double costs under this statute for want of the suggestion's being proved within the limited time, *a consultation must be awarded*.

Watkinson v. Sir G. Pacy, Latch, 140. S. C. Noy, 81.

THEREFORE, where a prohibition was obtained upon a suggestion, which was not proved within the six months, and the defendant took issue with the plaintiff upon the suggestion, which issue was found for the plaintiff, it was resolved, that the defendant was not entitled to double costs under the 2 and 3 *Edw.* 6. because he had surceased his time. The words of the statute are, that he shall have a consultation and double costs, if the plaintiff in prohibition do not prove his suggestion; but here he could not have a consultation, because the matter in issue was found against him. He ought upon failure in the proof of the suggestion to have prayed a consultation, and then he would have had double costs.

Foy v. Lister, B. R. T. 4 Ann. 2 Ld. Raym. 1172.

WHERE a consultation is granted, because the suggestion was not proved within six months, the Court will not make the payment of the double costs and damages given, in such case, to the defendant in prohibition, by the 2 and

3 *Edw.* 6. c. 13, a part of the rule;—that would be unnecessary, for if a consultation be awarded for want of such proof, double costs and damages follow of course.

A SUIT was instituted in an ecclesiastical court against an *administrator* for tithes *due from the intestate in his lifetime*, to which suit the administrator, alleging a *modus*, obtained a prohibition, but did not prove his suggestion within the time limited for that purpose by the 2 and 3 *Edw.* 6. c. 13, and it was doubted, whether or not he was liable to double costs according to that statute.

Creake v. Pitcairne, T. 13 and 14 G. 2. Barnes, 129. Sed vide S. C. Cas. Pr. C. B. 157. Pract. Reg. 118. According to these books, the court resolved, that the plaintiff in prohibition was *not* liable to pay any costs.

IF a defendant in prohibition bring an action of debt for the recovery of the double costs and damages, given by the 2 and 3 *Edw.* 6. where a consultation is granted for want of the suggestion's being proved within six months, he shall also have costs in such action.

1 Rol. Abr. 516. l. 37.

THE 2 and 3 *Edw.* 6. c. 13. s. 14. gives costs where the party applying for a prohibition fails in proving the truth of his suggestion within six months; and this continued to be the only case, where either a plaintiff or defendant in prohibition was entitled to recover any costs, until the 8 and 9 *W.* 3. c. 11. By the third section whereof, it is enacted, "That in all suits "upon prohibitions, the plaintiff obtaining judgment, or "any award of execution after plea pleaded, or demurrer "joined therein, shall likewise recover his costs of suit; and "if the plaintiff shall become nonsuit, or suffer a discon- "tinuance, or a verdict shall pass against him, the defendant

Comb. 20.

The 5th sect. of 8 and 9 W. 3. c. 11. provides, that nothing in that act contained shall be construed to alter the laws then in being, relative to the payment of

costs by executors or administrators.

"shall recover his costs, and have execution for the same by "*capias ad satisfaciendum*, *fieri facias*, or *elegit*."

2 Str. 1062, 3. B. R. H. 396. Andr. 62. Barnes, 130.

WHERE judgment is given for the plaintiff, in a suit in prohibition, upon demurrer, or after plea pleaded, he shall have costs taxed from the suggestion, and so as to include the costs incurred by the motion.

Wills v. Turner, H. 2 G. 1. Cas. Pr. C. P. 11. S. C. B. N. P. 331.

THUS in prohibition, a motion being made that the prothonotary should not allow costs, except from the time of the delivery of the declaration, the Court unanimously declared, that the plaintiff ought to have his costs from the time of the suggestion, and of the suggestion itself, and all costs incident and subsequent thereto.

Sir Harry Houghton v. Starkey. In Scacc. H. 4 G. 1. 1 Str. 82. S. C. Fort. 348. S. C. cited B. R. H. 396.

So where, after judgment for the plaintiff in prohibition, the question was, whether the costs payable by the defendant, should be computed from the first motion, or only from the declaration? Upon search, it was found to be the course of all the courts, to tax only from the time of declaring, except in two instances, *viz*. *Eads* v. *Jackson*, B. R. 2 *Geo*. and *Brown* v. *Turner* and others, in C. B. where costs were allowed from the time of the original motion for the prohibition. And Mr. *Baron* FORTESCUE said, that this question had been put to all the judges, whose opinions were conformable to these two decisions. Therefore, in the principal case, the Court of Exchequer ordered costs to be taxed from the first application to the Court inclusively; and directed the officers to pursue that mode of taxation, in all such cases, for the future.

AFTERWARDS, in *Swetnam* v. *Archer*, the same question occurred, and received the same determination; and, in this case, it was agreed that the practice had been uniformly such, since the resolution in *Houghton* v. *Starkey*.

1 Str. ubi sup. Sed vide B. R. H. 396. where this case is cited differently, and said to have been never determined.

AND this point was again agitated, in a subsequent case, on account of a doubt entertained on the subject by a new master of the King's Bench; when the Court resolved, that the plaintiff in prohibition should have costs from the very first application for the prohibition, because the whole is but one suit, and the words of the 8 and 9 *W.* 3. c. 11. are, that the plaintiff shall recover his costs of suit.

Bury v. Cross, B. R. P. 1 G. 2. 1 Str. 83. S.C. 1 Barnard. K. B. 47. S.C. cited B.R. H. 396.

BUT it hath been holden, that a defendant in prohibition, in case of the nonsuit of the plaintiff, is not entitled to the costs occasioned by opposing the rule for the prohibition, but merely to the costs of the nonsuit.

THUS, upon a rule to shew cause why the prothonotary should not review his taxation of costs, it appeared, that the plaintiff in a suit in prohibition, had been nonsuited; upon which the question was, whether the defendant ought to have the costs incurred by opposing the rule to shew cause why the writ of prohibition should not be granted, as well as the costs of the nonsuit? It was determined, that he ought to have no more than the costs of the nonsuit. If the defendant had succeeded in his opposition to the rule to shew cause why the prohibition should not be granted, it would even then have been for the consideration of the Court, whether, upon all the circumstances of the case, that rule should be dis-

Carlisle v. Meyrick, C. B. H. 17 G. 3. Say. on Costs, 137.

charged with costs; but as he did not succeed in that opposition, it must be now intended that it was groundless, and, consequently, there is no pretence for his being allowed the costs thereof.

If, upon argument of a demurrer to a declaration in prohibition, a writ of prohibition be awarded as to some of the points contained in the libel in the court below, and a consultation as to others, the plaintiff in prohibition shall have costs.

Middleton v. Croft, B. R. M. 11 G. 2. B. R. H. 395. S. C. Andr. 57. 2 Str. 1062.

Thus where *John Middleton* and his wife were libelled against in the spiritual court, for being married out of canonical hours, without licence or banns, and in a private house; a prohibition was applied for, upon a suggestion that the power of the ecclesiastical court was taken away by the statute of 7 and 8 *W.* 3. c. 35. by which penalties were laid on the clergyman marrying, and the parties married, without banns or licence, which penalties were to be recovered in the temporal court. In order to bring the matter fully before the court the plaintiffs were ordered to declare in prohibition; the defendant by his plea denied (in common form) that he had proceeded in the spiritual court contrary to the writ of prohibition; and for a consultation demurred generally. After joinder in demurrer by the plaintiffs, *John Middleton*, the husband, died; however, notwithstanding his death, the Court, at the instance of the parties, and because the ecclesiastical court might still proceed against the wife, gave judgment, that the prohibition should stand as to that part of the libel which was for marrying at an uncanonical hour, (*i. e.*)

not between the hours of eight and twelve in the forenoon, and that a consultation should be awarded *quoad* the residue of the cause.

In consequence of this judgment, application was made to the Court that the master might be directed to tax *Anne Middleton*, the wife, her costs, upon the 8 and 9 *W.* 3.; but no suggestion being then made upon the roll, of the husband's death, the Court refused, at that time, to grant any rule.

This suggestion being afterwards made, the matter was moved again, and a rule to shew cause was granted.

For the plaintiff, the case of Dr. *Bentley* and the Bishop of *Ely* was cited; where, in a suit in prohibition in this court, judgment was given that the prohibition should stand as to all the articles, concerning which the Doctor was libelled below; but upon a writ of error in the House of Lords, that judgment was reversed, and a new judgment given,—That the prohibition should stand as to part of the articles, and a consultation go as to the rest; and there it came to be debated, whether the plaintiff in prohibition was entitled to costs, he having judgment only for part; and this was solemnly argued, upon a day appointed for that purpose, by all the judges then present; and finally the plaintiff had judgment thereupon for his costs. Vide 4 Bro. Parl. Cas. 66.

Upon the first argument of the principal case, the whole Court were clearly of opinion, that where a prohibition goes to part, and a consultation to other part, the plaintiff in pro-

Hilary Term, 10 Geo. 2.

hibition is entitled to costs. And Lord HARDWICKE, then *Chief Justice* of this court, observed, that this case was within the very words of the statute of 8 and 9 *W.* 3. c. 11. s. 3. which are, *if the plaintiff obtain judgment, or any award of execution after plea pleaded, or demurrer joined*; and the statute only provided for the defendant's recovering his costs in such suits where the plaintiff should become nonsuit, suffer a discontinuance, or a verdict should pass against him; neither of which was the case here. And as to the *quantum* of the costs, he said, that though it was an equitable construction of the statute, to give costs from the first motion; yet where a consultation was awarded as to part, it was in the discretion of the court, upon the circumstances of the case, whether they would allow costs from that time or not.

HOWEVER, it being objected, that the death of the husband before judgment had abated the suit, no rule was then made for costs, but the Court ordered this point to stand over for further argument.

ACCORDINGLY, this question was argued in a subsequent term, when the Court were unanimously of opinion, that in this case, the circumstance of the husband's death, previous to the judgment, was not an abatement of the suit, even at the common law; or, if it was, that it was clearly aided by the 8 and 9 *W.* 3. c. 11. s. 7. And thereupon they made the rule for the allowance of costs to the wife absolute; and added, that such costs must be allowed from the time of the original motion for the prohibition.

Andr. 62.

So it hath been determined, that a defendant in a suit in prohibition is entitled to costs, where a verdict is found for him, though it be for part only of the matter in issue, and a consultation be awarded for the residue.

Malton v. Acklam. M. 22 G. 2. Barnes, 138.

If, in a suit in prohibition, the plaintiff be obliged to declare as administrator (as if the prohibition be granted to a suit, in the spiritual court against the plaintiff as administrator, for tithes due in the intestate's lifetime) and become nonsuit at the trial, he is not liable to the payment of costs.

Creek v. Pitcairne. T. 15 G. 2. Cas. Pr. C. P. 157. Pract. Reg. 118.

A plaintiff in prohibition is entitled to costs, by the statute of 8 and 9 *W.* 3. c. 11. only where he obtains judgment after plea pleaded, or demurrer joined; but if there be judgment by default in a suit in prohibition, and the plaintiff have damages upon a writ of inquiry, for the contempt in proceeding after the writ of prohibition delivered, he will be entitled to costs, by virtue of the statute of *Gloucester*, c. 1.: this was determined in the following case.

Upon a motion to set aside a writ of inquiry of damages in prohibition, after judgment by default, upon which the jury had found damages for the plaintiff, it was alleged on the part of the plaintiff, that the citing him to appear in the spiritual court in a plea of which that court has no cognizance, and whereby the plaintiff may sustain great damage, is a contempt of the laws of the land, and therefore the defendant ought to make the plaintiff satisfaction for the damage sustained by the proceedings in the court below; and this the

Sir E. Bettinson v. Dr. Hinchman. M. 7 G. 1. Cas. Pr. C. P. 20. S. C. B. N. P. 331. Lill. Ent. 320. Acc. Raym. 387. 2 Jon. 128. 1 Vent. 337. 348. 350. 3 Lev. 360.

defendant tacitly admits, by suffering judgment to go against him by default. And if the plaintiff be entitled to damages, he is also to costs, under the statute of *Gloucester*.

THE Court inclined to be of this opinion, but took further time to consider of the matter. On a subsequent day, the question was solemnly argued; after which the Court gave the plaintiff leave to proceed on his inquiry, and directed the prothonotary to tax his costs. But because, in this case, the defendant was prosecuted for a contempt at common law, as judge of the spiritual court, and he could not possibly be in contempt until the rule was made absolute to stay his proceedings, the costs were allowed only from the time that the rule for the prohibition was made absolute.

IT should seem that the case reported, by the name of Sir *Edward Bettison* v. *Savage*, in *Com.* 335. is the same with that above stated; though it must be confessed, the reports differ very widely in several material points.

ACCORDING to *Comyns*, the plaintiff having declared in prohibition, the defendant, *quoad* any proceedings since the writ of prohibition delivered, pleaded not guilty, and for a consultation demurred: there was judgment for the plaintiff upon the demurrer, and upon a writ of inquiry of damages in that issue, the jury found 2 *d.* damages. And the Court were of opinion, the plaintiff should have costs; and, upon error in the King's Bench, this judgment was affirmed. And, afterwards the reporter adds, a writ of error was brought in parliament, which was dropped upon his

persuasion that it was reasonable, and agreeable to the authorities in law, that the plaintiff should have costs.

If one of the issues joined upon a declaration in prohibition be, whether the defendant hath proceeded in the spiritual court subsequent to the granting of a writ of prohibition, and, at the trial, it be found against the defendant; or if, in an attachment upon a prohibition, it be found that the party proceeded after the writ of prohibition awarded, the plaintiff, in both cases, is entitled to recover damages and costs for the contempt.

Facy v. Lange. B.R.M. 15 Car. Cro. Car. 559. S. C. 1 Rol. Abr. 516, 575. Jon. 447.

Vide 1 Str. 485. 8 Mod. 1.

If defendant in prohibition compels the plaintiff to declare, and then pleads a nugatory plea, the Court will, on motion, order him to pay costs to the plaintiff.

As where, at the defendant's instance, it was made part of the rule for a writ of prohibition, that the plaintiff should declare in prohibition. The defendant afterwards demanded a declaration, and threatened a *nonpros* for want thereof. Whereupon the plaintiff's agent prepared a declaration, but when it was ready, he was told by the defendant's agent that he need not deliver it; however, having been at the trouble and expence of preparing it, he delivered the same, and demanded a plea. Defendant pleaded nothing to the merits, but only that he did not proceed in the spiritual court after the prohibition, gave a rule to reply, and demanded a replication. Upon which the plaintiff obtained a rule for the defendant to shew cause why he should not pay plaintiff the costs of the proceedings in prohibition. The

Seed v. Wolfenden. H. 29 G. 2. Barnes, 148.

rule was now made absolute. The Court looked upon the plea to be a sham nugatory plea, not being to the merits of the cause; the allegation that the defendant has proceeded contrary to the prohibition, is, and must be put into every declaration of this kind; but whether he has so proceeded or not, is totally immaterial. The statute 8 and 9 *W.* 3. c. 11. gives costs after plea pleaded, or demurrer, but this is not a plea within that statute.

BUT, though a plaintiff in prohibition may have prepared, and actually tendered, a declaration to defendant, proceedings shall be stayed without costs, where the defendant is desirous of submitting without further litigation.

Gegge v. Jones. B.R.H. 14G.2. 2 Str. 1149.

THUS, upon shewing cause against a prohibition, the Court made the rule absolute, with a direction that the plaintiff should declare in prohibition. He tendered a declaration, but the defendant refused it, and applied to stay proceedings, as being willing to submit. The plaintiff insisted he had a right to go on, in order to get at the costs of the motion, which he could not otherwise have. But the Court stayed the proceedings *without* costs; saying, the direction to declare was in favour of the defendant, who might wave it.

SECT. VII.

Of Costs in Proceedings upon Writs of Mandamus.

THE writ of *mandamus* is a high prerogative writ, issuing, in the king's name, from the Court of King's Bench (that court having a general superintendency over all inferior jurisdictions and persons), and directed to any person, corporation, or inferior court of judicature, within the king's dominions, requiring them to do some *particular* thing therein specified, which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes, to be consonant to right and justice. 3 Bl. Com. 110. B. N. P. 199.

THE original nature of the writ of *mandamus*, and the end for which it was framed, direct upon what occasions it should be used. It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore, it ought to be used on all occasions where the law has established no specific remedy, and where in justice and good government there *ought* to be one. In the more ancient cases, indeed, the grounds upon which the Court of King's Bench have granted or refused a *mandamus* are not explicitly stated; but the grounds on which that court will either grant or refuse such writs, have been clearly developed and stated in the later decisions, particularly in those which occurred during the time when Lord MANSFIELD presided as Chief Justice. His lordship has repeatedly declared, that the Court of King's Bench 3 Burr. 1267. 1 T. R. 404. 2 Burr. 1045. 3 Burr. 1659. 4 Burr. 2188.

Cowp. 378., 1 T. R. 148. would never interpose, by granting this prerogative writ, *unless the party* making the application (and having a *legal* right)

3 T. R. 651,2. *has no other specific legal remedy.* It must be a *legal* as well as a specific remedy; therefore, if the party applying for a writ of *mandamus* make out a legal right, the court will not consider his having a remedy *in equity* as any answer to the

1 T. R. 404. 3 T. R. 652. application. And even though the party may have another legal specific remedy, if such other remedy *be obsolete*, the court will grant a *mandamus*. As, for instance, in the case

Vide B. R. H. 99, 100. of admission or restitution to an office, for which a *mandamus* has frequently, in modern times, been granted, although the party had another remedy by *assize*.

B. N. P. 199. 2 Keb. 244. THIS writ is the proper remedy to enforce obedience to acts of parliament, and to the king's charters, and, in such

Vide B. R. H. 99. cases, is demandable *ex debito justitiæ*; but where the right is

4 Burr. 2189. of a private nature, as in the case of an office, in which the public are not concerned, such as a deputy register, it is discretionary in the court either to grant or to refuse it.

THE writ of *mandamus* is grounded on a suggestion, by the oath of the party making the application, of his own right; whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made (except in some cases where the right is manifest, when they will grant the writ upon the first motion) directing the party complained of to shew cause why a writ of *mandamus* should not issue, which rule to shew cause must be always upon the same person or persons to whom the writ is to be directed. If, at the time appointed by this rule, no

sufficient cause be shewn, the writ itself then issues, at first in the alternative, either to do thus, or signify some reason to the contrary; to which a return, or answer, must be made at a certain day. And, if a return be made to it, which, upon the face of it, is insufficient, then there issues a *peremptory mandamus*, to do the thing absolutely; and, if *that* be not immediately obeyed, or if no return be made to the first writ of *mandamus*, the court will grant an attachment against the disobedient or refractory parties.

But if the party to whom the writ is directed, at the first, makes a return, which, on the face of it, is good and sufficient, the Court of King's Bench will proceed no further on the *mandamus*. But then, if the return be false in fact, or in substance, though true in words, the party injured may have an action upon the case against the party making such return, and shall recover damages equivalent to the injury sustained; or, if the matter concern the public government, and no particular person be so interested as to maintain an action, the court will grant an information against the persons making the return. And if in such action (brought in the Court of King's Bench), or information, the return be falsified, a *peremptory mandamus* will be granted; unless a writ of error be brought on the action for the false return, pending which, no peremptory *mandamus* shall go.

11 Co. 99. b.

Salk. 374. B. R. H. 184.

Salk. 430.

2 Str. 983. Sed vide 1 P. Wms. 351.

As, at common law, a plaintiff might recover damages in an action upon the case for a false return to a *mandamus*, he is now entitled to costs, where he succeeds in such action, by virtue of the statute of *Gloucester*, c. 1.; and, that being the

case, where he fails therein, the defendant has a right to costs, under the 4 *Jac.* 1. c. 3.

THE party could neither plead to, nor traverse, the return to a *mandamus*, at the common law, but, if the return was false, his only method of obtaining redress was, as above stated, by action on the case. But now by the statute of 9 *Ann.* c. 20, after reciting, that divers persons who had a right to the offices of mayors, bailiffs, portreeves, and other offices within cities, towns corporate, boroughs and places, or to be burgesses or freemen of such cities, &c. have either been illegally turned out of the same, or have been refused to be admitted thereto, having in many of the said cases no other remedy to procure themselves to be respectively admitted, or restored to their said offices or franchises of being burgesses or freemen, than by writs of *mandamus*, the proceedings on which are very dilatory and expensive, it is enacted—"That as "often as, in any of the cases aforesaid, any writ of *manda-* "*mus* shall issue out of the Queen's Bench, the courts of "sessions of counties palatine, or out of any the courts of "grand sessions in *Wales*, and a return (1) shall be made "thereunto, it shall and may be lawful to and for the per- "son or persons, suing or prosecuting such writ of *manda-* "*mus*, to plead to, or traverse all or any the material facts

If a return be made to a *mandamus*, the party suing out the writ may plead thereto; to which the party returning may reply, &c.

(1) The first section of 9 Ann. c. 20. requires a return to be made to the *first* writ of *mandamus*. Before this act, an attachment did not issue for want of a return, till after a *pluries mandamus*, and after that a peremptory rule for a return, which created much expence and delay; indeed, in extraordinary cases, where the Court apprehended much mischief from the delay, they would require a return to the *alias*, and, sometimes, even to the first writ. Vide Salk. 429. 434. Skin. 669. 6 Mod. 25.

" contained within the said return; to which the person or " persons making such return shall reply, take issue, or de- " mur; and such further proceedings, and in such manner, " shall be had therein, for the determination thereof, as might " have been had if the person or persons, suing such writ, " had brought his or their action on the case for a false re- " turn; and if any issue shall be joined on such proceedings, " the person or persons suing such writ, shall and may try " the same in such place, as an issue joined in such action on " the case, should or might have been tried; and in case a " verdict shall be found for the person or persons suing such " writ, or judgment given for him or them upon a demurrer, " or by *nil dicit*, or for want of a replication or other plead- " ing, he or they shall recover his or their damages and costs, " in such manner, as he or they might have done in such " action on the case as aforesaid; such costs and damages to " be levied by *capias ad satisfaciendum*, *fieri facias*, or *elegit*; " and a peremptory writ of *mandamus* shall be granted with- " out delay, for him or them for whom judgment shall be " given, as might have been, if such return had been ad- " judged insufficient; and in case judgment shall be given for " the person or persons making such return to such writ, he " or they shall recover his or their costs of suit, to be levied " in manner aforesaid."

And further proceedings to be had, as if an action on the case had been brought for a false return.

And in case judgment be given for the person suing such writ, he shall recover damages, and costs, as he might have done in such action on the case, together with a peremptory *mandamus*.

And if judgment be given for the person making such return, he shall recover costs.

THE 12 *Geo.* 3. c. 21, after reciting, that, although a writ of *mandamus*, to admit any person to the franchise of being a citizen, burgess, or freeman of any city, town corporate, borough, cinque port, or place within *England* or *Wales*, is obeyed, the person applying for the same is, never-

theless, put to great trouble, delay, and expence; and that, by the laws in being, in many cases, no provision is made for giving costs to the party suing out any such writ, where the same is obeyed;—enacts—"That where any person shall be "entitled to be admitted a citizen, burgess, or freeman, of any "such city, &c. and shall apply to the mayor, or other per- "son, officer or officers, in such city, &c. who have or hath "authority to admit citizens, burgesses, and freemen therein, "to be admitted a citizen, burgess, or freeman thereof; and "shall give notice, specifying the nature of his claim, to such "mayor, or other officer or officers, that if he or they shall "not so admit such person a citizen, burgess, or freeman, "within one month from the time of such notice, the Court "of King's Bench will be applied to for a writ of *mandamus* "to compel such admission; and if such mayor, or other "officer or officers, shall, after such notice, refuse or neglect "to admit such person, and a writ of *mandamus* shall after- "wards issue to compel such mayor, or other officer or of- "ficers, to make such admission, and, in obedience to such "writ, such persons shall be admitted by the said mayor, or "other officer or officers, a citizen, &c. of such city, &c. then "such person shall (unless the court shall see just cause to the "contrary) obtain and receive from the said mayor, or other "officer or officers, so neglecting or refusing as aforesaid, all "the costs to which he shall have been put in applying for, "obtaining, and serving such writ of *mandamus*, and en- "forcing the same, by a rule to be made by the court out of "which such writ shall issue, for the payment thereof, to- "gether with the costs of applying for, obtaining, and en- "forcing the said rule; and if the rule so to be made, shall

Person entitled to be admitted a citizen, &c. to apply to the proper officer for that purpose, and give notice that unless such officer shall so admit him within one month from that time, the Court of King's Bench will be applied to for a *mandamus*.

And if, in consequence of the officer's refusal to make such admission after such notice, a *mandamus* do, actually issue, and in obedience to it, the officer make the admission, then he shall pay to the person applying for the *mandamus* all the costs incurred on account of such application.

"not be obeyed, then the same shall be enforced in such "manner, as other rules made by the said court are, or may "be enforced by law."

IT is obvious from the language of these statutes, that there are many cases, to which they do not extend, therefore, in all those cases, the proceedings must be according to the course of the common law.

FROM the case of *Rex* v. *Bankes*, Esq. it should seem that, where a rule to shew cause why a writ of *mandamus* should not issue, is discharged, either because the case is not proper for a *mandamus*, or that a sufficient ground is not stated to induce the court to interpose in that way, the party against whom such writ is prayed, is, in general, entitled to costs; though under particular circumstances, the court will discharge such a rule without costs. B.R.H. 4 G. 3. 3 Burr. 1458.

THE case alluded to, as far as respects the present point, was as follows; a rule was made upon *John Bankes*, Esq. lord of the leet for the borough manor, or lordship of *Corfe-Castle*, in the isle of *Purbeck* in the county of *Dorset*, to shew cause why a writ of *mandamus* should not issue, directed to, and requiring him to hold a court-leet in and for the said manor, and there to proceed to the election of a mayor of the said borough of *Corfe-Castle* for the then present year. Vide 11 G. 1. c. 4. s. 3.

WHEN cause came to be shewn, upon the merits, against this rule, Lord MANSFIELD proposed, that the counsel for the defendants should file their affidavits; that the prosecu-

tor's counsel might be able to judge, whether, upon the affidavits on both sides compared together, the election of the mayor *de facto* was a doubtful election, and fit to be tried upon an information in nature of a *quo warranto*; or whether it was a mere colourable election, and clearly void. For, if the former should prove to be the case, the Court ought *not* to grant a *mandamus*; in the latter case, they ought.

THIS was accordingly done, and four days afterwards, Mr. Serjeant *Davy*, who was for the prosecutor, having read over the affidavits, filed on the part of the defendants, was content to give up his rule, in case the defendants would not insist upon costs.

BUT Mr. *Bankes* not being willing to quit his claim to costs on the rule being discharged, that point was litigated.

THE Court having heard both sides, thought it reasonable, upon the circumstances disclosed to them, to discharge the rule *without* costs.

M. 27 G. 3. 2 T. R. 396. IN the *King* v. the Bishop of *Chester*, a rule calling on the defendant to shew cause why a *mandamus* should not issue, commanding him to licence a curate of an augmented curacy, to which there were cross nominations, was discharged, because the party had another specific legal remedy by *quare impedit*. And the Court desired it to be understood that, as two different applications had been made for a *mandamus* to a bishop without a good foundation, if a similar one were made in future, on the same ground, they would discharge the rule *with costs*.

Ibid. 405.

SECT. VIII.

Of Costs in a feigned Issue.

WHERE any important fact is strongly controverted in a suit in Chancery, or on the *equity* side of the Exchequer, both these courts are so sensible of the deficiency of trial by written depositions, that they usually direct the matter to be tried by jury. But as no jury can be summoned to attend the Chancery, or the court on the equity side of the Exchequer, the fact is generally directed by the former court, to be tried in the King's Bench, and by the latter, at the common law side of their own court, upon *a feigned issue*. Vide 3 Bl. Com. 452.

FEIGNED issues are also, frequently, used in the courts of law, by consent of the parties, to determine some disputed right without the formality of pleading, and thereby to save much time and expence in the decision of a cause.

WHERE a feigned issue is directed by a court of law, costs always abide the event of the verdict, though not mentioned in the rule for the feigned issue; but, it is otherwise, where such an issue is sent by a court of equity to be tried in a court of law, for, in the latter case, no costs are given on the verdict, but the finding of the jury is returned to the court of equity, where the costs are discretionary. Palmer v. Williams, C. B. M. 15 G. 2. Barnes, 130. Vide 1 Atk. 139. Say. Rep. 25.

WHILST an action of trespass was depending to try whether Herbert v. Williamson,

B.R.P. 25G.2. 1 Wils. 134. S. C. Say. Rep. 24. Vide Hoskins v. Lord Berkeley, B. R. M. 32 G. 3. 4 T. R. 402.

certain lands were within the township of *Kendall* in *Westmoreland*, a pamphlet was published by Dr. *Rotheram* to prove that such lands were within that township. Upon which, the Court of King's Bench was moved, that an information might go against the Doctor, upon an allegation, that this book was written with a view to influence the jury of the county of *Westmoreland*, on the trial of the above question. Upon shewing cause against the rule for an information, it was proposed and agreed by the counsel on both sides, and by the Court, that it might be tried at *Lancaster* upon a feigned issue. Accordingly the question was tried, in that shape, at *Lancaster*, and a verdict was found for the defendant, *viz.* that the lands were within the township of *Kendall*. Upon the return of the *postea* the master refusing to tax the defendant his costs, a motion was made for the direction of the Court in that particular.

After this matter had been argued at the bar, Wright, Denison, and Foster, *Justices*, (*absente* Lee, *Chief Justice*,) were clear, that the Court, in this case, had no discretionary power as to costs, but that costs by law must follow the verdict. That this was not a new question, but was determined in this court, in the case of *Still* v. *Rogers* (1) 1 *Ann.* where a feigned action was ordered to be tried at the assizes, upon an issue directed by the Court of King's Bench upon a matter in the Crown-office, and, a verdict being found for the plaintiff, he had his costs. *Nicholls* v. *Nicholls*, was also a feigned issue, and costs followed the verdict. And

3 *Ann.* Vide Say. Rep. 25.

(1) 1 Lill. Abr. 477. Wright, *Justice*, said, this book was of authority in matters of practice.

this is always so when a feigned issue is directed by a *court of law*, but when a feigned issue is directed by the Court of *Chancery*, then this court gives *no* costs, but the finding of the jury is returned to the Chancery, and costs are there in the discretion of that court, because the statutes giving costs do not extend to courts of equity.—The master was ordered to tax the defendant his costs. Say. Rep. 25.

According to Mr. Serjeant *Sayer*'s report of this case, the objection taken at the bar, to the defendant's right to costs, was grounded on a supposed distinction between the cases of a feigned issue in a civil action, and a feigned issue in a *criminal* proceeding; in the former, it seems to have been admitted, that costs ought always to follow the verdict, but in the latter, it was insisted, none ought to be paid, because neither party is entitled to costs in a criminal proceeding.

In *Say.* the case is stated as follows: upon a rule to shew cause, why an information should not be filed against the defendant, for a misdemeanor, a feigned issue was, by consent, ordered.

The issue having been found for the defendant, and the rule to shew cause having in consequence of the verdict been discharged, the question, upon an application by the defendant for costs, was, whether, as costs were not mentioned in the rule for the feigned issue, or in the rule for discharging the rule to shew cause, he ought to have any?

It was holden that he ought to have the costs of the issue, but not any of the rule to shew cause.

And Wright, *Justices*,—In answer to the objection, that, this feigned issue being ordered in a criminal proceeding, no costs ought to be paid, cited *Still* v. *Rogers*, where a feigned issue was ordered in a criminal proceeding, and it was, nevertheless, adjudged that costs ought to follow the verdict. And, he added, from a note of that case, in his possession, it appeared, that, although costs were not mentioned in the rule for the feigned issue, the determination of the Court of King's Bench was, that costs ought to follow the verdict (1).

Supra.

But, though it is clear, at this day, that costs shall, as a matter of course, follow the verdict in a feigned issue, ordered in proceedings on the *crown* side of the Court of King's Bench, the costs to be taxed on such a feigned issue, are only those of *the feigned issue itself*, that is,—such costs as were incurred *from the time when the issue was first ordered and agreed to*; unless the terms of the consent-rule are such as to include costs incurred antecedent to such order and agreement.

Rex v. Philips, B.R.H. 23G.2. 2 Wils. 261.

Thus where, upon a motion for an attachment for a

Rex v. Griffith, B.R.M. 29G.2. Say. Rep. 253.

(1) In a recent case, the Court of King's Bench strongly intimated an opinion, that, as feigned issues were only granted with the leave of the court, it would be prudent in future, when they permitted such issues to be tried, to compel the parties to consent that the costs should be in the discretion of the court. Vide Hoskins v. Lord Berkeley, B. R. M. 32 G. 3. 4 T. R. 402.

rescue, a feigned issue was ordered to try whether the defendant had been guilty of a rescue.

A VERDICT being found for the defendant, the question was, whether he ought to have the costs of the motion, as well as those of the feigned issue?

IT was determined, that he ought to have the costs of the feigned issue only. And by the Court,—There is not any difference betwixt the present case, and the case of a feigned issue, ordered upon a rule to shew cause why an information should not be filed; and it has been, frequently, holden, that in the latter case only the costs of the feigned issue ought to be paid.

So where a feigned issue had been agreed upon, between the parties, and by approbation of the court, in order to try a corporation right. This issue having been tried, and found for the prosecutor in the original motion, for the information in the nature of a *quo warranto*, the question now was (upon a motion for the direction of the Court to the master), whether the prosecutor should have all his costs *previous* to the feigned issue, or any, and what part of them; or whether he should only have his costs *from* the feigned issue? Thomas v. Powell, B.R.P. 31 G.2. 1 Burr. 603.

DENISON and WILMOT, *Justices*,—were clear, that the costs to be taxed upon such a feigned issue, were only the costs of *the feigned issue itself*, and not any costs antecedent to the consent to "try the right in a feigned "issue."

And they both said, that it would be endless to enter into the costs *previous* to the feigned issue; for they would always be sure to have disputes, which party was right, and which wrong, at first, and upon the original motion.

Lord Mansfield concurred in their opinion; which he explained to mean (and to which they assented), from the time when the feigned issue was first ordered and agreed to.

In the last case, the costs of the disputes about *settling* the feigned issue, *after* it was agreed upon and ordered, were considered as part of the costs, which were to be taxed to the plaintiff; (who had prevailed in the questions disputed, both before the master, and before the Court.)

Rex v. Nicholls. B.R.T. 28 and 29 G. 2. Say. Rep. 229.

Again, a *mandamus* having been awarded, whereby the defendants, who were justices of the peace, were commanded to appoint overseers of the poor for *Walsal-Foreign*, the return was, that *Walsal-Foreign* is not a distinct division from *Walsal*-Borough.

A rule was afterwards made to shew cause, why an information should not be filed against the defendants for a false return.

Upon shewing cause to this rule, a feigned issue was, with consent, ordered, to try whether *Walsal-Foreign* was a distinct division from *Walsal*-Borough; and it was inserted in the rule for the feigned issue, *that costs should abide the event of the trial.*

Vide post.

It being found by the verdict, that *Walsal-Foreign* is a distinct division from *Walsal*-Borough, and a peremptory *mandamus* being awarded, the question was, whether the defendants ought to pay the costs of the rule for the information, which were incurred by the prosecutor before the feigned issue was ordered?

It was resolved, that they ought not. And by Ryder, *Chief Justice*,—It has been said, that, if the rule for the information had been made absolute, and there had been a verdict against the defendants, the Court, unless they would have consented to go before the master, would, as has been the practice in some cases, have set a fine so large, that the third part thereof might have been sufficient to reimburse the prosecutor his costs, or at least a considerable part thereof; and it has been inferred, that, as the question would have been the same upon the information, as it was upon the feigned issue, the costs of the rule for the information ought to be paid. But all this proceeds upon a mistake; for, as the question in the information would, in effect, have been a question concerning a civil right, namely, whether *Walsal-Foreign* ought to have separate overseers, the Court, although there had been a verdict against the defendants, and they had refused to go before the master, would not have set a large fine.

It is observable, that the Court, in giving judgment in *Rex* v. *Nicholls*, do not appear to have adverted, in the slightest degree, to the part of the rule for the feigned issue, by which it was stipulated, that costs should abide the event

of the trial. Which is the more extraordinary, as the existence of that stipulation, in the consent rule for a feigned issue, has, in a subsequent case, been made the express ground of a contrary decision to that in the case last stated. For where in a cause on the crown side of the Court of King's Bench, a rule was entered into, by consent, that all matters in difference between the parties should be tried in a feigned action, and that the costs should abide the event of the issue, it was determined that the whole costs, both on the *crown* and civil side, antecedent and subsequent to the feigned issue, should be paid to the party prevailing therein; because, as the costs of the feigned issue only, would have followed the verdict of course, without any consent for that purpose, the constituting such consent part of the rule could be done with no other view but that of comprehending the *whole* costs. This was adjudged in the case of *Oldknow* v. *Wainwright*, which was as follows.

Oldknow v. Wainwright, or Rex v. Foxcroft, B. R.T. 33 G. 2. 2 Burr. 1017.

An information, in the nature of a *quo warranto* being prayed by *Seagrave* against *Foxcroft*, a feigned action was agreed to by the parties, to try a right of election to the office of town-clerk of *Nottingham*; for which appointment both *Foxcroft* and *Seagrave* were candidates.

The consent-rule was to the effect following.—"*Rex* v. "*Foxcroft*," &c. The first part of the consent is, "that the "matters in difference between the parties shall be tried in a "feigned action:" then the rule goes on, "that *Oldknow* "should be plaintiff, and *Wainwright* defendant;" and particularly specifies and settles the several issues that were to be

tried. Then comes a clause of consent, "That the judge "who should try the cause, should be at liberty to endorse "any special matter, that might arise at the trial, upon the "*postea*." Then it concludes thus—"And by the like con- "sent, it is lastly ordered, that the costs shall abide the event "of the issue."

THERE were four issues to be tried, three of which were found for the defendant, and as to the fourth, there was a special verdict, upon which, after argument, judgment was likewise given for the defendant.

ON a subsequent day, this case then bearing the name of *Rex* v. *Foxcroft*, cause was shewn, why the said defendant *Foxcroft* should not pay to the prosecutor in this cause, his costs as well in this cause of *Rex* v. *Foxcroft*, as in the information in the nature of a *quo warranto* against *Robert Seagrave*; and likewise the costs in the *mandamus* moved for against *Cornelius Hulbwaite*, Esq. late mayor of *Nottingham*.

AND it was urged, that no other costs were payable but those that arose upon the civil action, *viz*. the *feigned issue*. And for this, the authority of the case of the borough of *Walsal* was relied upon, as a resolution directly in point.

ON the other side, it was contended, that Mr. *Seagrave*, the prosecutor, was entitled to the costs of the whole, namely, the costs in the cause of *Rex* v. *Foxcroft*, the information against *Seagrave*, and on the *mandamus* directed

to *Hutbwaite*, as well as the costs of the civil suit, upon the feigned issue.

LORD MANSFIELD was of opinion, that the Court were tied down by the consent-rule, to direct the costs of the *whole* to be paid by the defendant *Foxcroft*. It was made in the cause where an information was prayed against him, in the nature of a *quo warranto*, to shew by what authority he claimed to be town-clerk of *Nottingham*; to which office *Seagrave* also claimed a right. *Foxcroft* thereupon consents, that the matters in difference between the parties shall be tried in a feigned action; and then he consents, in express terms,—that the costs shall abide the event of the issue. Which must mean the *whole* costs, or else it has no meaning at all; for the costs on the *civil* side (arising upon the feigned issue only) would of course abide its event, without needing any rule, or any consent for that purpose; that point having been fully settled long before the making of the present consent-rule Consequently, this consent takes in the other costs, on the crown side.

THE other three judges were of the same opinion. Rule made absolute.

Williams v. Attorney General. In Scacc. P. 1754. Burt. Pract. Excheq. 248.

AT the trial of a feigned issue at bar, in which the Attorney General was defendant, the plaintiff, apprehending that he could not proceed with safety, declined opening the cause, and submitted to a *nonpros*; and it was holden that he should pay no costs, the defence being on the behalf of the crown, who neither pays nor receives costs.

BUT where the king is not a party, the plaintiff on a non-suit in a feigned issue, is liable to costs, though the point in controversy should turn upon a grant from the crown.

Bagshaw on Dem. Sir G. Wynne v. the Bishop of Bangor. In Scacc. Hil. 1737. Ibid. 248,9.

IN one case, where three feigned issues were directed to be tried, and there was a verdict for the defendant upon the issue of the most material consequence, and for the plaintiff upon the others, it was holden, that if any one issue be found for the plaintiff, he must have his costs.

Tempest v. Metcalf. B. R. T. 25 and 26 G. 2. 1 Wils. 331.

IF an issue be directed out of chancery to be tried, and the party plaintiff in the issue gives notice of trial, and does not countermand it in time; upon motion, the Court of Chancery will give costs, and not put the defendant to move the court of law where the issue is to be tried.

Anon. 2 P. Wms. 68.

CHAPTER V.

OF COSTS, UPON AMENDMENTS; REPLEADERS; BRINGING MONEY INTO COURT; AND UPON A VERDICT OR JUDGMENT, AS TO PART ONLY, FOR THE PLAINTIFF.

SECT. I.

Of Costs, upon Amendments.

SECT. II.

Upon a Repleader.

SECT. III.

When Money has been paid into Court.

SECT. IV.

Where Judgment, or a Verdict, is given, as to part only, for the Plaintiff.

SECT. I.

Of Costs upon Amendments.

AMENDMENTS might be made at the common law, both in civil and penal actions, whilst all the proceedings continued in *paper*, for they were then considered as only *in fieri*, and therefore subject to the control of the courts. But, after the pleadings were once entered upon record, it was formerly held, that by the common law no amendment could be permitted, unless within the very term in which the judicial act so recorded was done: for during that term the record is in the breast of the court; but afterwards it admitted of no alteration. But now the courts are become more liberal; and where justice requires it, will allow of amendments at any time while the suit is depending, notwithstanding the record be made up, and the term be past. However, where an amendment is made in any subsequent term, the proceedings must still be *supposed* to be in *paper*, for where the court cannot help seeing that they are upon *record*, they have no authority to give leave to amend; except in such particulars as are comprised in one or other of the statutes of amendment. And even where the pleadings are still in paper, the court will not permit an amendment to be made, unless application, for that purpose, be made within a reasonable time.

Gilb. H. C. P. 114, 115. 2 Burr. 1099. 3 Bl. Com. 407.

Gilb. H. C. P. 108. 142, 3. Co. Litt. 260. a.

1 Burr. 322.

2 T. R. 707. Sed vide 1 Lill. Abr. 70. E.

INSTEAD of paying costs, at common law, for leave to

amend defective pleadings; it seems that, where an application was made for that purpose, it was usual for the court to impose a fine upon the party, or, according to the better opinion (1), upon the *pleader*, (in whose ignorance or inadvertence the defect originated) for his bad pleading, and then to grant the amendment prayed. This power of fining for a bad plea (whether it might be imposed on the party or advocate,) was exercised by both the superior and inferior courts; but having been much abused, particularly in the latter where the fine was paid to the lord, it was provided by the statute of *Marlbridge*, 52 *H.* 3. c. 11. that "neither in "the circuits of justices, nor in counties, hundreds, and "courts baron, any fines shall be taken *pro pulchre placi-* "*tando*, or *beaupleader*," that is, for leave to amend vicious pleadings. And it should seem that this prohibition is extended to the superior courts, by the statute of *Westminster* the first, 3 *Edw.* 1. c. 8. confirmed by 1 *Edw.* 3. *stat.* 2. c. 8.

Vide 2 Inst. 122.

Pref. Co. Ent.

From this abolition of the ancient fines imposed by the

(1) Lord Coke speaks of this fine *pro stultiloquio* both in his 2 Institute, 122, and in the preface to his Entries; in the former of these books, he maintains, that it was not imposed on the counsel for his mistake, but on the party for leave to amend a bad plea. However, in the preface to his Book of Entries, his lordship holds a different opinion; in proof of which he cites a record of 5 *Hen.* 3. in these words: "Radulphus de Bardfield qui narravit "pro germano filio Turoldi, in "misericordia pro stultiloquio;" and then proceeds thus,—"quod, "inter alia acta publica, evincit "manifeste, juridicum ea tempes-"tate, non clientem, mulctatum "fuisse; iniquum enim censebatur "clientem pœnas luere pro delicto "jureconsulti, quod sane nihil aliud "fuisset, quam in miserum cumu-"lasse miseriam, *viz.* mulctam pro "male placitando imposuisse clien-"ti, qui idcirco dicæ suæ fecit jac-"turam. Dominus Robertus de "Wilby, anno 24 *Edw.* 3. Jurispe-"ritos ad septum curiæ allocutu-"rus, dixit, *Jeo ay vieu le temps que* "*si vous ussez plede un erronious plea,* "*que vous alastes al prison.*"

courts on granting leave to amend, we may, perhaps, not unfairly, deduce the practice, which now generally prevails, on such occasions, of subjecting the party applying for leave to amend, to the payment of the costs thereof; for, as the giving leave to amend is an indulgence from the court, who had no longer a power to fine *pro stultiloquio*, it was thought reasonable that the party should at least pay costs upon amendments.

And at this day, generally speaking, whenever either party has leave to amend, the condition of paying costs is annexed to the rule. Vide Lofft, 155. 6 Mod. 2.

The plaintiff, however, may amend his declaration in matter of *form*, after a *general issue* pleaded, and before entry, without paying costs or giving an imparlance; but if the amendment be in matter of *substance* he must pay costs, or give an imparlance. And if the amendment be in substance after a *special plea* pleaded, the plaintiff must pay costs, although he had rather give an imparlance. So where the defendant had demurred to the declaration, and given a rule to join in demurrer, it was holden that the plaintiff could amend only upon payment of costs. Reg. B. R. M. 10 G. 2. n. (d) 1 Lill. Pract. Reg. 69. 2. Taylor v. Bramble, M. 8 G. 2. Barnes, 6.

It was formerly holden, that, upon an amendment before plea, it was in the defendant's election either to have costs, or take an imparlance, but, where the amendment was made subsequent to the plea, that it was optional in the plaintiff to pay costs, or give an imparlance; but, in a modern case, it was Place v. Twiford, 2 Keb. 120. Vide ibid. 363. 1 Keb. 175. 428. Reg. M. 1654. B. R. Sect. 13. Lechill v. Rey.

nell, 2 Str. 950. 1 Lill. Pr. Reg. 70. 475. acc. Comb. 58.

resolved, that this election, upon an amendment, resides with the defendant (1).

A PARTY obtaining leave to amend, on payment of costs, is only liable to such costs as are *necessarily* occasioned by the amendment.

Vide 2 Bl. 1276.

Rex v. Roger Philips, B. R. H. 32 G. 2. 2 Burr. 757.

THUS where, on a motion on the part of the prosecutor, that the master might review his taxation of costs, the case was, that the defendant had had leave to amend his plea, on payment of costs, but the amendments made in it were not essential to the real merits, nor such as defaced the record (there being much more struck out, than put in). The allowance made to the prosecutor upon the amendments of the plea itself, and of the subsequent pleadings, dependant upon it, had been only made, in proportion to the actual amendments made therein; and not as for an entire new plea.

LORD MANSFIELD.—The principle is certainly right, that where the defendant has leave to amend his plea, the prosecutor ought, in justice, to have liberty to reply quite *de novo*, if he judges proper; and also that, in all events, he ought to be allowed the expence of attending and consulting

(1) In all cases of amendments, after plea pleaded, the defendant has liberty to plead *de novo*, and has two days for that purpose after the amendment made and payment of costs. N. Reg. B. R. M. 10 G. 2. But in *Blunt* v. *Morris*, 2 Bl. 785. it was held that on amending the declaration, the defendant is entitled to *four* days time to plead; and all the prothonotaries and secondaries (except *Paramor*) were of opinion, that in such case, a new four days' rule to plead is also necessary. Vide 1 Lill. Pract. Reg. 475. D.

and feeing counsel, in order to advise whether it be prudent or proper to reply *de novo*, or not.

BUT where he does not judge proper to depart from his former replication and reply *de novo*, but only makes such alterations in it, as merely pursue and are the natural and necessary consequences of the alterations made in the plea by the defendant, and which alterations in the replication do not deface the record (which he took notice was the present case,) nothing more ought to be allowed, than in proportion for such necessary alterations and amendments in the replication, and it's several dependencies; for it must not be left in the prosecutor's power to load the defendant unnecessarily, either out of spite or vexation, or for any other reason, exceeding the bare necessity of the thing.

MR. *Justice* DENISON (the only other judge then in court) was of the same opinion.

CONSEQUENTLY, as the master of the Crown-office had acted agreeably to this reasoning, the prosecutor's counsel took nothing by their motion.

BUT, though the terms of granting leave to amend are, in general, the payment of such costs as the opposite party must necessarily sustain by reason thereof, the courts have, in some instances, under particular circumstances, directed amendments to be made *without* costs.

As where, after judgment upon a demurrer, in the entry of Anon. B. R. T. 2 Jac. 2. 3 Mod. 118.

This amendment seems to have been made after error brought; as to which, vide post.

the award of a writ of inquiry upon the roll, a few words (*viz.* by the oath of twelve good and lawful men,) were omitted;—the Court held it amendable without costs.

Tite v. the bishop of Worcester, B. R. M. 8 W. 3. 1 Ld. Raym. 94. Vide ibid. 116.

So where ejectment was brought against the Bishop of *Worcester* and six others, who all seven entered into the rule to confess lease, entry, and ouster. The plea roll, the *distringas*, and the *jurata*, were against seven defendants, but the *nisi prius* roll and the *postea*, made mention but of five defendants. After verdict for the plaintiff, it was moved that by this omission of two of the defendants in the *nisi prius* roll, and *postea*, the action was discontinued against all. Upon which the plaintiff made application to the judge who tried the cause, to return the *postea*, that all the seven defendants were found guilty; which was the fact; for all the defendants appeared at the trial and made defence, and the verdict was given against them all. The judge, accordingly, returned all seven guilty, upon the *postea*. The plaintiff, afterwards, moved that the Court would give him leave to amend the *nisi prius* roll, &c. by the plea roll. The Court said, as it appeared by the issue roll, that issue was joined by all seven, the omission of two defendants in making up the *nisi prius* roll was a mere mistake of the clerk, and, therefore, well amendable. Afterwards Sir *Bartholomew Shower* moved, that the plaintiff should pay costs for this amendment, because the defendants had sued a writ of error, for this error only;—but the Court rejected the motion, because this amendment was made before judgment was given, at which time (1) the defendants ought not to have sued their writ of error, but should have waited until judgment had been given.

(1) Vide 1 T.R. 280.

And where, after rule for judgment for the plaintiff, and before entry of it, the defendant brought error. Afterwards, in the entry of the judgment, the clerk made an error by mistake; and leave was given to the plaintiff to amend without payment of costs.

Anon. B.R.M. 10 W. 3. cited 1 Ld. Raym. 95.

In another case, the court permitted a joinder in demurrer to be amended without costs, the defect appearing to be a mere *vitium clerici*.

Ridge v. Irton. B.R.P. 24 G. 2. Say. on Costs, 157.

Again, leave was given to amend an information of forgery in ten places, without costs or imparlance, because the amendments made no alteration of the fact.

Anon. B.R.T. 12 W. 3. Salk. 50.

If any costs should be incurred by the amendment of a defect in the entry of a special verdict; the party, plaintiff or defendant, in whose negligence the fault originated, shall pay such costs. Though, in one case, the court allowed the conclusion of a special verdict to be amended, after argument, without costs.

Anon. B.R.M. 22 Car. 1 Lill. Pr. Reg. 471. B.

Cromwell v. Grumsden, B. R. P. 10 W. 3. 1 Ld. Raym. 335.

Before the statute of 5 *Geo.* 1. c. 13. a writ of error was not amendable, because, it was said, that amendments are granted for the support of judgments, but the principal design of writs of error is to reverse them. But now, by the above statute, all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be amended, and made agreeable to such record, by the respective courts where such writs of error shall be made returnable.

1 Leo. 134. 1 Ld. Raym. 71. Carth. 368.

Sedvide Cowp. 426. semb. contra. Sir John Fortescue Aland v. Mason, B. R. H. 3 G 2. 1 Barnard. K. B. 100. 176. S. C. 2 Str. 863.

UPON amendments of writs of error, it should seem that no costs are payable. In the case of Sir *John Fortescue Aland* v. *Mason*, the Court declared themselves of that opinion, saying, that as the statute contained no provision with respect to costs, in such cases, they did not see how they had authority to give any.

Gardiner v. Merrott, B. R. P. 4 G. 2. 2 Ld. Raym. 1587. S. C. Barnard. K. B. 462. 2 Str. 902.

So where there was a variance between a writ of error and the record, which neither party would move to amend for fear of paying costs, the Court, having observed the defect, declared that they might *ex officio* amend the writ of error, and make it conformable to the record, by virtue of the 5 *Geo.* 1. c. 13. without any application, for that purpose, by either of the parties. And they further resolved, that the plaintiff in error was not liable to costs upon such an amendment, the statute not directing any to be given thereon.

THIS case seems to be also reported, by the name of *Marret* and *Gardiner*, in *Fitzgib.* 268.; and it is there laid down by the Court, that, where an amendment of a writ of error is prayed upon the statute of 5 *Geo.* 1. c. 13. it is to be without costs: but if the prayer be also to amend the assignment of errors, the rule is with costs, because then the party comes for a favour of the court.

Gilb. H. C. P. 171, 2. Salk. 49. Nicholas v. Chapman, 3 Lev. 345. 361. Wilkinson v. Meyer. 8 Mod. 234.

AFTER a writ of error brought, the court, in which the judgment was given, will, generally, in favour of the judgment, permit the defendant in error to amend the record. But there is the following diversity with respect to the terms upon which they will grant this indulgence. If the plaintiff

in error wave his writ of error, and agree to prosecute it no farther, after the amendment, the defendant in error shall not be allowed to amend, but upon the condition of his paying the costs, not only of the amendment, but also of the writ of error; because, till the record was amended, the plaintiff in error had a sufficient cause for bringing the writ. But, on the other hand, if the plaintiff in error, after and notwithstanding the amendment, elect to proceed, the defendant will then be allowed to amend without paying the costs, even of the amendment; for, in the latter case, it is obvious that the plaintiff did not depend on the error amended, but on others, for the reversal of the judgment.

Vide Tho. Jon. 212. 2 Ld. Raym. 897. Barnes, 7. H. Bl. 643. acc. Et vide etiam 3 Mod. 113.

THE defendants, in an action of replevin, having obtained an order to amend the avowry on payment of costs, their agent, after the plaintiff's death, but before he was acquainted with it, paid the costs taxed on the amendment to the agent of the plaintiff;—and the judges in the Treasury ordered the money to be repaid.

Fyson v. Cooke. M. 22 G. 2. Barnes, 138.

SECT. II.

Of Costs upon a Repleader.

WHEN the parties join issue upon a fact which is totally immaterial, or insufficient to determine the right, so that the Court, after trial thereof, cannot know for whom judgment ought to be given, they regularly award a repleader, or

6 Mod. 2. Hard. 331. 1 Lev. 32. 1 Burr. 301, 302. and the cases there cited.

give judgment *quod partes replacitent*; unless it appears, from the whole of the record, that no manner of pleading the matter can avail, and then a repleader would be nugatory.

Salk. 579. 6Mod.2. 4Bac. Abr. 126.

If a repleader be granted, the pleadings must begin *de novo* at that stage of them, whether it be the declaration, plea, replication, &c. wherein there appears to have been the first defect or deviation from the regular course.

6 Mod. 2. 1 Lill. Pract. Reg. 472. B. Salk. 579. 3 Burr. 304.

No costs are allowed to either party upon a repleader, because it is a judgment of the Court upon the pleading; and both parties were in fault to suffer an immaterial or insufficient issue to be joined, and therefore neither of them can have any claim to receive costs from the other.

Anon. C.B.T. 2 W. and M. 2 Vent. 196.

Thus where, in an action of *assumpsit* against an administratrix, the defendant pleaded that she herself (instead of the intestate) made no such promise, after verdict a repleader was awarded, without costs on either side.

Noble v. Lancaster, P. 8G2. Barnes, 125. S. C. Pract. Reg. C.P.374. Cas. Pr. C. P. 116.

So where, in an action of trover, the defendant pleaded *non assumpsit*; and issue being joined thereon, the cause was tried, and a verdict was found for the plaintiff; but this issue being immaterial, the judgment was arrested, and a repleader awarded. A rule to replead was afterwards given by the plaintiff, and, for want of the defendant's repleading, judgment was signed by default, and a writ of inquiry executed. Upon which a question arose, whether the prothonotary, in taxing costs on signing the final judgment, should allow the plaintiff the costs of the immaterial pleading, and trial;—

and the Court directed that he should not allow such costs, because there had been faults on both sides.

SECT. III.

Of Costs, when Money has been paid into Court.

IF the plaintiff accept of the money brought into court upon a plea of tender, he shall pay costs to the defendant. 5 Bac. Abr. 20. Say. on Costs, 146. Vide 1 Vent. 21. Barnes, 357, 8.

THE practice of bringing money into court first arose in the time of Lord *Chief Justice* KELYNG, and was introduced for the purpose of avoiding the hazard and difficulty of pleading a tender; and with a view of enabling a party, who had had no opportunity of making a tender, or at least had omitted to do so, to satisfy the debt, for which the action was commenced, without incurring any further expence. White v. Woodhouse, M. 1 G. 2. B. R. 2 Str. 787. S. C. 1 Barnard. K. B. 25. Sed vide Salk. 597.

WHEN, therefore, a defendant does not controvert a plaintiff's right of action altogether, but merely the amount or *quantum* of his demand, he may (in a species of action where the practice is allowed) as a matter of course before plea pleaded, and, at this day, even after plea, by obtaining a judge's order for the purpose, pay so much money into court, as he apprehends to be really and justly due to the plaintiff; and no inconvenience ensues to the plaintiff from this practice, because, in general, the condition of paying costs, up to that time, is made part of the rule giving the defendant leave to bring the money into court. 1 T. R. 711.

Savage v. Franklyn, H. 8 G. 2. Barnes, 280. S. C. Pract. Reg. C.P. 254. Davies v. Mansell, H. 13 G. 2. Barnes, 282. S. C. Pr. Reg. C. P. 255. Vane v. Mechell, H. 17 G. 2. Barnes, 284. Bate v. Crane, P. 24 G. 2. Ibid. 287.

If the plaintiff proceed in his action after the defendant has paid money into court upon the common rule, and afterwards move to take it out, the Court will give him leave to do so, upon condition of paying to the defendant the costs which he may have incurred, subsequent to the time, when he brought the money into court.

So if, after the money paid in, the plaintiff proceed to trial, and thereupon either become nonsuited, or do not recover damages exceeding the sum brought into court, he shall pay costs to the defendant.

Savage v. Franklyn, Davies v. Mansell, Bart. Vane v. Mechell, Bate v. Crane, ubi supra.

But, by proceeding after the defendant has paid money into court, the plaintiff does not forfeit his right to costs up to that time, in case he, afterwards, at any time *before* trial, consents to accept of it, and to stay proceedings.

B.R.H. 28 G. 2. Say. Rep. 196.

This doctrine was, however, contradicted in the case of *Berwick* v. *Symonds*, wherein it was holden, that the plaintiff, who had proceeded after the defendant had brought money into court, and then discontinued his action, was *not* entitled to costs up to the time of bringing the money into court. But, notwithstanding this decision, the constant practice, at least of late years, in the King's Bench, has been conformable to that established, by the cases above cited, in the Court of Common Pleas.

Hartley v. Bateson, B. R. H. 27 G. 3. 1 T. R. 629.

For where, upon a rule obtained by the plaintiff, to shew cause, why the master should not be directed to tax the costs of the plaintiff to the time of the defendant's paying money

into court, and those of the defendant from that time to the time of countermanding the notice of trial; and why the defendant should not pay the balance to the plaintiff; it appeared, that the plaintiff had, notwithstanding the payment of money into court by the defendant, proceeded in his action, so far as to deliver the issue with notice of trial, and that he had afterwards countermanded such notice.

Per Curiam.—On inquiring of the master, it appears to be the constant and regular practice, that the plaintiff is entitled to have his costs to the time of paying money into court; and the defendant all his subsequent costs. Rule absolute.

But if the defendant pay money into court upon the common rule, and the plaintiff proceed in his suit actually *to trial*, when a verdict is found for the defendant, or a juror is withdrawn by consent, the plaintiff is not, in either case, entitled to any costs at all, not even to those incurred previous to the time of the money being paid into court.

Indeed in *Griffiths* v. *Williams*, where the plaintiff, after the defendant had paid money into court after plea, upon a judge's order, proceeded to trial, and obtained a verdict, which, being only for the exact sum that had been brought into court, was afterwards set aside, and a verdict entered for the defendant; it was holden, that the plaintiff should have costs up to the time of the payment of the money into court, and that he should pay the defendant the subsequent costs. B.R.P. 27 G. 3. 1 T. R. 712.

BUT this part of the case last cited has been expressly denied to be law; and the above distinction between the cases, where a plaintiff proceeds in his action after money has been paid into court, and desists *before* trial, and where, after such payment, he actually goes on *to trial*, and then has a verdict against him, is now, by some very recent determinations of the Court of King's Bench, fully established.

Stevenson v. Yorke, B. R. M. 31 G. 3. 4 T. R. 10. S. P. Kabell v. Hudson, Ibid. 11.

ON the trial of this cause the defendant obtained a verdict, but, as he had paid money into court before trial, it was now moved that the plaintiff should be allowed his costs up to that time, on the authority of *Hartley* v. *Bateson*, and *Griffiths* v. *Williams*; and that they might be deducted out of the costs to be paid by him to the defendant.

BUT BULLER, *Justice*,—said, that though the plaintiff was entitled to the costs up to the time of paying money into court, if the application were made before trial, yet that the party came too late after trial; and that that part of the case of *Griffiths* v. *Williams* could not be supported.

Per Curiam. Rule refused.

Stodhart v. Johnson, B.R. P. 30 G. 3. 3 T. R. 657.

AGAIN, after the declaration was delivered, the defendant paid 540*l*. into court, which the plaintiff did not then take, but proceeded to trial, when a juror was withdrawn by consent. And the question was, whether the plaintiff was or was not entitled to the costs till the time of paying the money into court? The master having taxed those costs, a rule was obtained to shew cause why the taxation should not be set aside.

THE Court—said, that whenever a juror was withdrawn (*a*) each party must pay his own costs. And (*a*) S.P.Comb. 75.

BULLER, *Justice*,—observed, that the form (1) of the rule decided this question; for it was part of the rule, that if the plaintiff would not accept of the money brought into court, with the costs, &c. the said money should be struck out of the declaration. Then if it be struck out, that is not considered as part of the declaration. Rule absolute.

THE costs of paying money into court, and taking it out by the plaintiff, must be paid by the defendant, although he tendered the money to the plaintiff's attorney, before such payment into court, who then refused to accept of it; for though the defendant might tender the debt, he could not tender the costs before they were taxed. Cotton v. Perks, T. 8 and 9 G. 2. Pract. Reg. C. P. 258. S. C. Cas. Pr. C. P. 120.

THOUGH the condition of paying costs usually constitutes part of the common rule for bringing money into court, yet, where it appears that the action was brought and kept on foot very oppressively, the Court will grant the rule without annexing that condition.

(1) The form of the common rule for paying money into court, now used in the King's Bench, is as follows:

Wednesday next after three weeks of the Holy Trinity, in the 30th year of King George the Third.

Denn, } IT is ordered, that the de-
Fenn. } fendant have leave to bring into court four pounds four shillings; and thereupon, unless the plaintiff shall accept thereof, with costs to be taxed by Mr. *Benton*, in full discharge of this suit, the said 4*l*. 4*s*. shall be struck out of the declaration, and paid out of court to the plaintiff, or his attorney, and upon the trial of the issue, the plaintiff shall not be permitted to give evidence for the said 4*l*. 4*s*. Upon the motion of Mr. *Minshull*.

By the COURT.

Johnson v. Houlditch, B. R. P. 31 G. 2. 1 Burr. 578. S. C. 5 Bac. Abr. 21.

THUS, in an action upon the case for the use and occupation of a house, the defendant had obtained the common rule for liberty "to pay 2 *l.* 5 *s.* into court, and to have it struck "out of the declaration on payment of costs." The plaintiff's attorney applied to get these costs taxed and take the money out of court. Upon which, a motion was made, on the part of the defendant, that this rule so far as related to the *costs* might be discharged; and also that the plaintiff should pay the costs of the suit itself, and also the costs of that application.

THE motion was grounded upon the following circumstances:—a quarter's rent (amounting to 2 *l.* 5 *s.*) and nothing more was due from the defendant to the plaintiff. The defendant was always ready to have paid it; but the plaintiff kept out of the way in order to prevent a tender, and yet brought this action as above stated. The defendant summoned the plaintiff before a judge to shew cause, why, upon payment of the debt and costs, proceedings should not be stayed. The plaintiff's attorney pretended that his client had *other* demands, and, therefore, refused to take the 2 *l.* 5 *s.* and costs. And so the judge was precluded by this allegation from interfering, and could make no order; in consequence of which, the defendant was obliged to apply to the court for the common rule, to pay the 2 *l.* 5 *s.* into court, with the costs then incurred.

THE Court, upon full consideration of the matter, looked upon these proceedings, thus carried on by the plaintiff, to be oppressive; and, therefore, they did discharge so much of

the common rule, as directed the payment of costs by the defendant to the plaintiff; but rejected the other part of the motion.

And by Lord Mansfield, *Chief Justice*.—Upon the particular circumstances of a case, the Court has a power, although the general rule be otherwise, to give leave to bring money into court upon the common rule without costs; and the present, wherein the plaintiff kept out of the way on purpose, to avoid a tender of the rent, is a proper case for giving such leave. It is, in the general, of course, to allow costs, where leave is given to amend: but the Court may, upon the particular circumstances of a case, give leave to amend without costs.

Denison, *Justice*.—The Court has, certainly, a power, where the justice of a particular case requires it, to dispense with a part of one of it's rules; which can only be adapted to general cases.

Foster, *Justice*.—There is, perhaps, no case, where costs are more generally given, than upon the granting of a new trial; and yet a case may be so circumstanced, as to make it proper for the Court to grant a new trial, without annexing the condition of paying the costs of the former trial.

Wilmot, *Justice*.—The circumstances of this case are so peculiarly hard, that the Court ought to go as far as by the rules of law it can in granting relief. If the first application had been for leave to bring money into court upon the

common rule, without costs, I should have been for giving it; and I see no reason why it should not be now given.

Fawcett v. Rowles, cited in Hellier v. Hallet, T. 21 and 22 G. 2. Barnes, 286.

If the defendant pay money into court upon the common rule, with respect to some counts only of the declaration, and the plaintiff think proper to accept of it, he is entitled to costs upon the whole declaration up to that time.

But the practice is different in the Court of King's Bench; where, if money be paid into court upon some of the counts only, and the plaintiff take it out, he is entitled to the costs only of those counts.

Baillie v. Cazelet, B. R. H. 32 G. 3. 4 T. R. 579.

Accordingly, in an action upon a policy of insurance, the declaration contained several counts, averring interest in different persons. The defendant paid money into court upon some of those counts, which the plaintiff took out. And, the master having only taxed the plaintiff his costs on those counts, it was moved, that the master might review his taxation, and allow the plaintiff costs upon all the counts; on the ground, that the other counts were not added for the purpose of vexation, but were essentially necessary, in order to adapt the declaration to the truth of the case as it might appear at the trial, it being doubtful who was interested.

Lord Kenyon, *Chief Justice*.—The invariable rule of this court has been not to allow the plaintiff all the costs under these circumstances; and it is founded on principles of justice. When a defendant pays money into court on some of the counts only, it is saying, in other terms, that he admits

that the plaintiff has a cause of action against him to a certain extent, but that he means to defend himself against the charges contained in the other counts. And the plaintiff, by taking the money out of court, precludes himself from all right to the costs upon the other counts.

Per Curiam. Rule refused.

WHERE a plaintiff proceeds to trial after the payment of money into court upon the common rule, and has a verdict against him, although he is entitled to the money paid into court, it is usual for the Court to order it to be paid to the defendant towards the satisfaction of his costs, or if the sum exceed what is due to him on that account, so much thereof as will be sufficient for the purpose.

Rathbone v. Stedman, T. 2 G. 2. Pract. Reg. C. P. 251. S. C. Cas. Pr. C. P. 54. S. P. Anon. H. 8 G. 2. Barnes, 280. Maddox v. Paston, P. 8 G. 2. Cas. Pr. C. P. 117.

Bunb. 287. acc. Sed vide B. R. H. 206. Semb. contra.

So where the plaintiff proceeded in his action after money had been brought into court, upon the common rule, but, before the trial, applied for leave to take it out, the Court granted it, with costs to the time of bringing the money in, the plaintiff first paying the subsequent costs to the defendant out of the money in court, if sufficient; and if not, the plaintiff to supply the deficiency, and thereupon proceedings to stay.

Bate v. Crane, P. 24 G. 2. Barnes, 287.

IF, in an action in the Court of King's Bench, the plaintiff choose to accept of money brought into court on the common rule, the court will not grant an attachment against

the defendant for the non-payment of the costs up to that time, their rule in that particular not being compulsory; but the plaintiff must, in such case, go on to trial, and, although he may not recover damages to the amount of the sum paid into court, he shall have the costs of the whole proceedings.

Hand v. Lady Dinely, H. 18 G. 2. 2 Str. 1220.

As where, in an action of *assumpsit*, the defendant brought eight pounds into court upon the common rule. The plaintiff took it, and after taxing the costs up to that time, demanded them of the defendant; but, as these were not paid, he went on to trial, and obtained a verdict for seven pounds eighteen shillings. It was insisted, that, as the plaintiff was overpaid by the money taken out of court, he ought not to have the costs of the proceedings subsequent to the bringing it in. But the Court held, that, as to the costs, this case was to be considered as if no rule had been made, because the terms of it had not been complied with by the defendant; and that, in such case, it is not usual to grant an attachment, but the plaintiff, as the rule is only a conditional one, goes on. And they directed the *postea* to be delivered to the plaintiff, in order that he might tax his whole costs; but he was ordered, upon taking out execution, to allow for the eight pounds which he had taken out of court.

Scarrall v. Horton, M. 14 G. 2. Barnes, 283. S. C. Pract. Reg. C.P. 259.

The Common Pleas form of the common rule for bringing money into court, formerly, corresponded with that now used in the King's Bench, but the former court, considering it as defective, because not obligatory on the defendant as to the

payment of costs, have altered (1) and rendered it compulsory in that respect; and, consequently, now, in case the plaintiff shall think proper to accept the money paid into court, and the costs are not paid up to that time, an attachment may be had against the defendant in that court.

IF the plaintiff accept the money paid into court, *his* attorney must procure, from the master or one of the prothonotaries, an appointment to tax the costs, and serve a copy of the same, upon the defendant's attorney. This is now the rule both in the Common Pleas and King's Bench, though a contrary practice, formerly, prevailed in the latter court; where it was holden that, unless the *defendant*, after paying money into court upon the common rule, served the plaintiff with notice of an appointment before the master to have his costs taxed, the plaintiff was not bound to take any notice of

1 Cro. Pr. 3d. edit. 143. Imp. Pr. C. P. 2 edit. 259. 4 T. R. 12.

(1) The following is the form of the common rule for bringing money into the Court of Common Pleas; viz.

In the Common Pleas.

Trinity Term, in the 30th year of the reign of King Geo. 3.

Denn against *Fenn*, Wednesday the 23d of June. IT is ordered that the defendant shall pay to the plaintiff, or his attorney, thirty-one shillings and six-pence, together with costs to be taxed by one of the prothonotaries of this court, if the plaintiff will accept thereof in full discharge of this suit, and that thereupon all further proceedings in this action shall be stayed; but if the plaintiff will not accept thereof in full discharge of this suit, that then the defendant shall immediately bring the said thirty-one shillings and six-pence into this court, and the said thirty-one shillings and six-pence shall be considered as struck out of the declaration, and be paid out of court to the plaintiff, or his attorney, and upon the trial of the issue, the plaintiff shall be permitted to take a verdict for so much only, as he shall prove beyond the said thirty-one shillings and six-pence.

On the motion of Serj. —— for the defendant.

By the COURT,

GERRARD.

the rule. But the Court of King's Bench conceiving this part of their practice to be inconvenient, in the following case, declared that, in future, the notice of the appointment to tax the costs, in the case of which we are treating, shall be given by the *plaintiff*.

Kabell v. Hudson, B. R. M. 31 G. 3. 4 T. R. 10.

In this case, the defendant paid money into court at the time of pleading, which the plaintiff then took, but proceeded to trial, when he was nonsuited. And he obtained a rule on a former day in this term, to shew cause why he should not have his whole costs, notwithstanding he was nonsuited, on the ground that the defendant had not served him with notice of an appointment before the master to have his costs taxed; which

Erskine now insisted was necessary, according to the practice of the court; in which he was confirmed by the master.

Marryat, who opposed this motion, observed, that the books of practice did not agree upon this subject; the affirmative being laid down in *Imp.* 4 ed. 224; and the negative in *Richards. Pract. B. R.* 228; *Harr. Pract. B. R.* 93; and 1 *Crompt.* 3 ed. 143.

Buller, *Justice*.—This is the first motion of the kind ever attempted to be made; for it calls on the defendant to shew cause why the plaintiff should not have his full costs, notwithstanding he was nonsuited; if the nonsuit cannot be supported, he should have moved to set it aside; but as it remains in force, he cannot have his full costs. Neither is he

entitled to the costs even up to the time of the defendant's paying the money into court: that was decided the other day. The rule of practice, which has been relied on in support of the motion, seems inconvenient; but inconvenient and absurd as it may be, we should hold ourselves bound by it, (being only two judges in court.) However, supposing this to be the established practice, it will not govern this case; for even if the defendant (not the plaintiff) be bound to give notice of the appointment to tax the costs, there is a prior act to be done by the plaintiff, namely, his signifying to the defendant his assent to take the money; for, if he will not assent to that, it is nugatory for the defendant to give notice of an appointment which the plaintiff will not observe.

GROSE, *Justice*, agreed, that it was necessary for the plaintiff to signify his assent to accept the money, before the notice of the appointment was served.

AFTERWARDS BULLER, *Justice*, said, the master is now satisfied that it is more convenient that the plaintiff, than the defendant, should give notice of the appointment to tax the costs: therefore let it be understood, in future, that such is the practice. Rule discharged.

Pending an action of debt on bond, the defendant may bring into court principal, interest, and costs, in discharge of same.

BY the 4 and 5 *Ann.* c. 16. s. 13. it is enacted, "That "if at any time, pending an action upon any such (1) bond "with a penalty, the defendant shall bring into the court "the same, upon payment of a "lesser sum at a day or place cer- "tain."

(1) This word *such* refers to the preceding clause, which mentions —"Any bond which hath a condi- "tion or defeazance to make void

"where the action shall be depending, all the principal "money, and interest due on such bond, and also all such "costs as have been expended in any suit or suits in law or "equity upon such bond, the said money so brought in shall "be deemed and taken to be in full satisfaction and dis- "charge of the said bond, and the court shall and may give "judgment to discharge every such defendant of and from "the same accordingly."

ALTHOUGH the words of this clause are so express that a defendant, bringing the principal and interest into court, in an action of debt upon a bond with a penalty, shall pay "all such costs as have been expended in any suit or suits in "law or equity upon such bond;" yet the authorities, which have occurred upon the subject, appear to be contradictory.

Merrill v. Jocelyn, B.R.T. 13 Ann. Cited B R. H. 368.

IN an action of debt upon a bond in the Common Pleas, the defendant pleaded payment before the day, the plaintiff replied *non solvit*, and a verdict was found for him. The judgment being reversed, on account of the immateriality of the issue, another action was, afterwards, brought upon the bond in the King's Bench, and the defendant then moved to stay proceedings, on bringing in principal, interest, and costs. The Court held, that the plaintiff was entitled to the costs of the suit in the Common Pleas. Not that persons are entitled to costs in every false action; but here the plea was a fraud, and that being the occasion of reversing the judgment, the defendant shall derive no advantage therefrom, but ought to pay the costs.

AND, in another case, where, upon an application to stay an action of debt upon bond, on payment of principal, interest, and costs, the question was, whether the defendant ought also to pay the costs of a suit in the Exchequer, relative to the same matter?

Lock v. Shermer, B. R. P. 8 G. 2. B. R. H. 116.

LORD HARDWICKE said, he believed it had been ruled upon the statute for the amendment of the law, that the defendant should do so; and that costs in equity, relating to suits on bonds, had been referred to and taxed by the master. And, accordingly, the rule was made absolute to stay the proceedings, on payment of principal, interest, and costs, and of the costs in the Exchequer.

BUT where, upon a similar application, it appeared, that the plaintiff had brought an action of debt upon a bond against the defendant as administratrix; filed a bill in equity to discover assets; and also instituted a suit in the ecclesiastical court, to oblige her to give in an inventory. That after judgment for the plaintiff in the action, a writ of error was brought in the King's Bench, and the judgment reversed; upon which this second action was brought. Upon a motion for the Court's direction to the master in taxing the costs, it was insisted for the plaintiff, that the defendant ought to pay the whole costs of the first suit, the proceedings in Chancery, and the spiritual court; and the case of *Merrill* v. *Jocelyn*, was cited for this purpose.

Sisney v. Nevinson, B. R. P. 12 G. 1. 1 Str. 699.

Sed per Curiam,—We have nothing to do to order costs for proceedings in another court, which has a power to award

costs, if the party is entitled to them; and as to the judgment, that is reversed, there is no reason why the defendant should pay for the error and mistake of the plaintiff. We are of opinion the proceedings in this cause must be stayed on payment of the costs of this suit.

Saltern v. Wynne, B. R. P. 10 G. 2. 2 Str. 1072. S. C. B. R. H. 367.

And where an executor brought error on a judgment against the testator upon a bond; and, after affirmance, and an action brought upon the judgment in the Court of King's Bench, moved on the 4 and 5 *Ann.* c. 16. to bring in principal, interest, and costs. The master being doubtful, this being the case of an executor, whether he should allow the costs of the affirmance of the judgment upon the writ of error, the Court were moved for their direction upon the subject. When it was insisted, that, as the defendant came for a favour to save the penalty, it was but equitable he should pay the costs in error, to which he had put the plaintiff; for if the plaintiff had taken execution, equity would never have punished him for taking those expences out of the penalty.

But the Court, upon the authority of the case of *Sisney* v. *Nevinson*, determined, that, as by law the executor was not to pay costs upon a writ of error, a court of law could not direct them to be taxed, though there was a penalty.

SECT. IV.

Of Costs where Judgment, or a Verdict is given, as to Part only, for the Plaintiff.

If there are several counts in a declaration, and the plaintiff obtain a verdict upon one count only, it is the practice of the Court of Common Pleas to allow him his entire costs on the *whole* declaration.

Thus, in a special action upon the case, the declaration contained two counts, and a verdict was found for the plaintiff upon the second count only; but the prothonotary having taxed costs for the plaintiff on both, it was moved that he should tax costs for the defendant on the first count.

Bridges v. Raymond, C. B. H. 12 G. 3. 2 Blackst. 800.

But this being a case where the plaintiff had only laid his demand two different ways, and had succeeded in one of them; there being also a remedy, by application to the Court in the outset to strike out supernumerary counts, in case they be frivolous or vexatious; it being also hard, to tie up a plaintiff on peril of costs, to lay his case in such a way only, as he is sure to prove;—and it being certified to the Court, by all the prothonotaries, and secondaries, and by Serjeant *Wilson*, on forty years experience, that it had been the invariable practice of this court to tax costs for the plaintiff only, in case he recovered on any of his counts. It was agreed, *per totam Curiam*,—That the defendant should take nothing by his motion.

AND this rule does not only obtain in cases where the substantial cause of action is the same throughout all the counts, only varied by the mode of laying them, but holds, equally, where the different counts contain different and distinct causes of action.

Norris v. Waldron, C.B. P. 18 G. 3. 2 Blackst. 1199.

THUS, in trespass for fishing in plaintiff's fishery, there were five counts, for different places in which the trespass was laid to be committed. On not guilty pleaded, a verdict was found for the plaintiff on the third and fourth counts, and for the defendant on the first, second, and fifth. The prothonotary having allowed the plaintiff costs on *all* the counts, *Hill*, Serjeant, moved, that he might review his taxation; on affidavit that the first and second counts related to a fishery in the river *Arrow*, the third and fourth to a certain pit or pool, and the fifth to a certain close or waste, distinct from the other two; for which the plaintiff might have well brought three separate actions. That the great question was understood to be concerning the river *Arrow*, that a view was had of all, and the defendant came prepared to prove his case in all the places.

GROSE, Serjeant, for the plaintiff, after observing that it was not sworn that there were different witnesses, who attended as to the different counts, insisted on the practice of the court, which was to tax costs for the plaintiff generally, where he succeeded upon any one of his counts, and cited *Slavin* v. *Wadsworth*, P. 3 *G.* 3. and *Peterson* v. *Baugass*, (1)

(1) This seems to be the same case as the anonymous one reported in Bull. *Ni. Pri.* 335. which is there stated as follows,—In trespass the

M. 4 G. 3; in which he was supported by all the officers of the court.

De Grey, *Chief Justice*.—At first sight it seems hard, upon principles of natural justice, that a plaintiff should have his whole costs, where he fails nine parts in ten. But the rule is a positive one, arising from the express directions of the statute of *Gloucester*, which makes no distinction. But if a plaintiff put many causes of action, totally different, into one declaration, and succeeds upon only one of them; the rule, thus interpreted, seems, it must be owned, unreasonable. But, till the Court shall, upon consideration, make a new rule for this purpose, we are bound to follow the established practice. Besides the present case is not clear or strong in point of facts. The expence of the declaration must be trifling, the whole not being more than thirty lines. The view was had all at one day and at one time. Nor does it appear that the defendant had distinct witnesses to distinct facts.

Gould, *Justice*,—was for adhering to the ancient practice.

Blackstone, *Justice*.—In *Lloyd* v. *Day*;—divers counts for trespass in divers places. All the issues found for the defendant, except one on which a penny damages were given to the plaintiff. The Court held that the defendant could have no costs, and the plaintiff no more costs than damages. But Barnes, 149.

defendant pleaded three different justifications to three different counts, and on issue joined, had a verdict for him on two, and against him on the third. And on motion it was holden, that the plaintiff was entitled to costs on the whole declaration.

this matter was settled, upon great consideration, and the ancient practice established, in the case of *Bridges* v. *Raymond*; which is directly in point.

NARES, *Justice*,—of the same opinion. Rule discharged.

BUT, in this particular, the practice of the Common Pleas differs from that in the King's Bench; in which court, if issues are joined on several counts, and on some a verdict is found for the plaintiff, and on others for the defendant, the plaintiff shall not have costs on the part of the record, on which the verdict is found for the defendant.

Henderson v. Rumbold, B. R. H. 4 G. 3. Say. on Costs, 212.

THEREFORE, upon a rule to shew cause, why some counts should not be struck out of the declaration, Lord MANSFIELD, *Chief Justice*, said, it was not necessary to make such a rule absolute; inasmuch as the issues upon those counts, as to which evidence sufficient to entitle the plaintiff to recover is not given, ought to be found for the defendant; and the master informs us, that he does never allow the plaintiff costs, as to those counts, the issues upon which are found for the defendant. Rule discharged.

NEITHER is the defendant, in such case, entitled to costs on those counts, upon which the verdict is found for him.

Butcher v. Green, B. R. P. 21 G. 3. Dougl. 677.

As where, in an action upon the case, there was one count *in trover*, and another *for words*; and two pleas; not guilty, to the first count; and a justification to the second. —Verdict for the plaintiff on the count for *trover*, and for

the defendant on the other. A rule had been obtained to shew cause why the master should not tax the defendant his costs, relative to the pleadings and proceedings on the second issue which was found for the defendant, and why what should be allowed to him on such taxation should not be deducted out of what should be allowed to the plaintiff on the first issue, in case the same should exceed the costs allowed to the defendant.

CAUSE was now shewn; when BULLER, *Justice*, said, the practice of this Court had been uniform not to allow the defendant costs in cases of this sort. They differed, he said, from cases, where different issues are joined on different pleas: for, in those cases, the defendant is allowed his costs on the issues found for him. The rule discharged.

So where the declaration consisted of two counts, to the first of which the defendant pleaded not guilty, and to the last a justification. The plaintiff demurred to the justification, and judgment was thereupon given for the defendant. The general issue was tried, and found for the plaintiff.

Sir John Astley, Bart. v. Young, B. R. T. 1 G. 3. 2 Burr. 1232. S. C. Say. on Costs, 211.

THE question was, whether the defendant should have his costs of his judgment on the demurrer?

AND it was agreed by the Court, that the defendant could have *no* costs, but that the plaintiff was entitled to costs upon his verdict.

YET, in the following case, where there were two distinct

causes of action in two different counts, as to one of which the defendant suffered judgment to go by default, and as to the other took issue, and, at the trial, obtained a verdict, it was determined, that the defendant was entitled to judgment and *costs* on the count upon which he obtained a verdict, notwithstanding the plaintiff was entitled to judgment and costs upon the other count, whereon there was the judgment by default.

Day v. Hanks, B.R.P. 30G.3. 3 T. R. 654.

In an action on the case for disturbing the plaintiff in his right of common, the declaration contained two counts, for disturbances in two distinct commons: as to the first of which the defendant suffered judgment to go by default; and upon the second he took issue, and upon trial obtained a verdict.

In *Michaelmas* Term last the plaintiff obtained a rule *nisi* for the *postea* to be delivered to him, and for the master to tax his costs thereon.

On shewing cause against which, *Cockell*, Serjeant, con-
6 Edw. 1. c. 1. tended, that, though in general by the statute of *Gloucester*, the plaintiff was entitled to the costs of the trial if he succeeded on any count by which he was entitled to damages, notwithstanding he failed on others, yet that rule must be confined to such cases where the plaintiff obtains a *verdict* on such count, and does not extend to cases, where judgment goes by *default* as to one count, containing one cause of action, and the parties, afterwards, proceed to trial upon another count, containing a different cause of action, on which a verdict is found for the defendant. It would be

very oppressive, if it were so; for then the plaintiff, though clearly in the wrong with respect to the real ground of dispute, might insure his costs by adding a count, as in this case, for some trivial intrusion in a place, the right to which was never meant to be contested.

Law and *Chambre, contra*, contended, that, by the statute of *Gloucester*, the plaintiff was entitled to the costs of the whole record, it appearing that he was entitled to damages on one of the counts in the declaration, and they denied that any distinction had ever been taken in this respect between a judgment after verdict, and by default.

THE Court, were clearly of opinion, that the plaintiff was not entitled to the costs of the trial; but, whether the defendant was entitled to such costs, they said would more properly come under consideration upon a review of the master's taxation. They, therefore, directed that the *postea* should be lodged in the hands of the master, that he might tax the plaintiff his costs on the judgment by default, and tax the defendant his costs on the verdict obtained on the second count; which being afterwards done accordingly,

A RULE was obtained in this term, calling on the defendant to shew cause why the master's taxation of costs for him on the second issue should not be set aside. In support of the rule it was said, that, as the plaintiff was entitled to judgment on one count, it was impossible that the defendant could have judgment for his costs on the other; for then there

would be two judgments, the one for one party, and the other for the other party, on the same record.

Per Curiam.—There will be no incongruity in this case on the record. If the Court see two separate causes of action on the same record, on one of which the plaintiff succeeds, and the other is found for the defendant, they are bound to give two distinct judgments. So in an action for an assault and battery against two defendants, if one suffer judgment by default, and the other justify and obtain a verdict, there must be two separate judgments upon the record. Here the plaintiff will have judgment up to the whole extent to which he is entitled, by having judgment for his costs on the first count, as to which the defendant made default: and as to the other count, which contains a separate cause of action, and which has been found for the defendant, he is equally entitled to have judgment for his costs incurred by the trial of that issue. Rule discharged.

Yates v. Gun, M. 25 G. 2. Barnes, 141.

And in a case, in the Common Pleas, where, after issue and demurrer joined, the plaintiff proceeded to trial upon the issue, and recovered a verdict, and, afterwards, the demurrer was argued, and adjudged for the defendant;—The Court ordered the prothonotary to tax costs on both sides, and that the plaintiff's costs of the trial should be deducted out of those taxed for the defendant, if the latter should exceed the amount of the former; but if the plaintiff's costs should exceed the defendant's, the defendant should pay to the plaintiff the amount of the surplus.

But where, in an action of trespass, the declaration consists but of *one* count, part of which the defendant justifies, and the plaintiff then new assigns, without taking issue upon the special plea of justification, and, on the trial, obtains a verdict, he is entitled to the costs of the whole record.

As where the declaration was for trespass on lands on a certain day, and on divers other days, &c. The defendant pleaded two special pleas of justification on the particular day. The plaintiff, in two new assignments, replied that the trespass was committed on other days and on other occasions, &c. on both these issues were taken, which were found for the plaintiff, with one shilling damages. At the trial the trespass appeared to be wilful, because it was committed after a written notice; but, in point of fact, there was no certificate by the judge that the trespass was wilful. A rule had been obtained to shew cause why the master should not be directed to tax the plaintiff his costs on the special pleas. And it was agreed by both parties to consider this question as if the judge had granted a certificate, he being ready to certify.

Gundry v. Sturt, B. R. H. 27 G. 3. 1 T. R. 636.

On shewing cause against this rule, it was insisted, that this was similar to a case where the plaintiff, in his declaration, complains of three several trespasses, in three distinct counts: if the defendant plead two special pleas of justification to two of those counts, and the plaintiff abandon them, he is not entitled to the costs of those pleas, even though he should succeed on the third; in which particular the practice of this court differs from that of the Common Pleas. Now in this

case the plaintiff has comprehended several trespasses in one count, and the defendant was under the necessity of justifying one of those trespasses, in order to lessen the damages; and, as the plaintiff has not taken issues on the special pleas, he confesses the truth of them, and is in the same situation in which he would have been if his declaration had consisted of three counts, and he had abandoned two of them on the defendant's justifying. The defendant in this case does not ask for costs; his objection is, that the plaintiff is not entitled to have them.

ASHURST, *Justice*.—The master says, that it has always been the practice to allow the plaintiff the costs of the pleadings in such cases as the present. If the plaintiff had taken issues on the special pleas, it would have been different.

BULLER, *Justice*.—This is not like the case of a declaration, consisting of several counts, to some of which only there are pleas of justification. The plaintiff here, perhaps with a view to have costs, has taken in the whole complaint in one count; the defendant, by his pleas, did not justify the whole; and, therefore, the plaintiff was obliged to make a new assignment. The master says, he had no doubt in this case; and, according to the constant practice, the plaintiff is entitled to all the costs of the pleadings. Rule absolute.

Porter v. Harris, B. R. P. 14 Car. 2. 1 Lev. 63.

IF in an action of covenant against two defendants, one of them suffer judgment to go against him by default, and the other plead performance, which is afterwards found for him, the plaintiff shall have neither costs nor damages upon the

judgment by default, but the defendant, who pleaded, shall have costs upon his verdict.

So where an action of *assumpsit* was brought against several defendants, some of whom suffered judgment to go by default, and the others pleaded the general issue to the whole declaration, and, on the trial, obtained a verdict, it was holden, that the defendants who had pleaded were entitled to costs upon the verdict. Langdon v. Vinicombe, T. 7 and 8 G. 2. Cas. Pr. C. P. 107. S.C. Pract. Reg. C. P. 102.

If the plaintiff release part of the damages, he is not bound to release any part of the costs found by the jury.

Thus where, upon error of a judgment in the Common Pleas, it appeared, that, upon the execution of a writ of inquiry in an action of *assumpsit*, the jury had assessed separate damages upon every one of three counts, and twenty shillings generally for costs. That the plaintiff had released the damages as to two of the counts, and taken judgment for the residue with costs *de incremento*. Cutler v. Goodwin, B. R. P. 7. G. 1. 1 Str. 420.

It was objected, that the twenty shillings costs, given by the jury, went to the whole; whereas by the release the plaintiff confesses he has a cause of action but as to part.

Sed per Curiam.—All the precedents are so, the jury give the same costs in all cases, and, if the defendant is put to any particular expence upon the bad count, the Court can make him an allowance in the costs they give *de incremento*. Judgment affirmed.

CHAPTER VI.

OF COSTS, WHERE A NEW TRIAL IS GRANTED; FOR NOT PROCEEDING TO TRIAL,—OR TO EXECUTE A WRIT OF INQUIRY,—IN DUE TIME, OR PURSUANT TO NOTICE; WHERE A CAUSE IS REFERRED TO ARBITRATION, OR GOES OFF WITHOUT BEING TRIED.

SECT. I.

Of Costs upon the granting of a new Trial.

SECT. II.

Where a Plaintiff neglects, after Issue joined, to bring a Cause on to Trial, according to the Practice of the Court.

SECT. III.

For not proceeding to Trial pursuant to Notice.

SECT. IV.

For not proceeding to execute a Writ of Inquiry pursuant to Notice.

SECT. V.

Where a Cause is referred to Arbitration.

SECT. VI.

Where a Cause is made a Remanet, *or goes off by Consent at one Assizes, and is tried at a subsequent Assizes.*

SECT. I.

Of Costs upon the granting of a new Trial.

It was, formerly, holden, that, where a new trial was granted for irregularity, the costs of the former trial ought not to be paid; but that a new trial, upon the merits of a cause, could be granted only upon payment of the costs of the former trial. And in a case, where the judge, who tried the cause, reported, that the verdict was contrary to evidence, and against his direction, and that, if, under any circumstances, a new trial ought to be without costs, he thought, in the present case, it was proper, the Court held that a new trial could not be granted without costs. 12 Mod. 370. Brockhurst v. Copson, M. 2 G. 2. Pract. Reg. 408.

But, at this day, upon a motion for a new trial, the question with respect to the costs of the former trial rests solely in the discretion of the court; and they will grant or refuse them according to the circumstances of the case. However, in general, if a new trial be granted upon the merits of a cause, or because the first verdict is against evidence, or upon a new ground not opened at the first trial, the condition of paying the costs of the former trial is made part of the rule. Timmonds v. Marson, B. R. T. 28 G. 3. 1 Burr. 12. 394. 2 Burr. 665. 943. Bull. N. P. 327. Sutton v. Mitchell, B. R. M. 26 G. 3. 1 T. R. 20.

On the granting of a new trial, on account of the misconduct of the jury at the former trial, the costs of the first trial were ordered to abide the event of the second.

Hale v. Cove, B.R.M.12G.1. 1 Str. 642.

THE case was as follows:—The jury, having sat up all night, agreed in the morning to put two papers into a hat, marked P. and D. and so draw lots. P. came out, and they found for the plaintiff; which happened to be according to the evidence, and the opinion of the judge.

UPON motion for a new trial, it was agreed, that the verdict must be set aside; but the question was, whether the defendant should pay costs? The Court inclined to give the plaintiff costs, comparing it to the case of a verdict against evidence. But at last it was agreed, that the costs should wait the event of a new trial.

Timmonds v. Marson, B. R. T. 28 G. 3.

BUT where a verdict is against law, or the opinion and direction of the judge, it is the practice of both the Courts of King's Bench and Common Pleas to set such verdict aside, and grant a new trial in the former case, constantly, and in the latter, generally, *without* costs.

B.R.P. 9 G. 3. 1 Bl. 670.

ACCORDINGLY, in the case of *Pochin* v. *Pawley*, which was an action of *assumpsit* against the surveyor of a turnpike-road, by a farmer, employed by order of the commissioners, to repair the road. At *Leicester* assizes, ASTON, *Justice*, was of opinion, that there was no evidence of any contract with the surveyor personally and the plaintiff, but that the contract was made with the commissioners, and that the surveyor was only their servant or messenger: and, therefore, he would have nonsuited the plaintiff, but he refused to be nonsuited; and a jury of farmers gave a verdict for the plaintiff. On a motion for a new trial, the Court were unanimously of

opinion with Mr. *Justice* ASTON; and, though they held that the Commissioners could not be personally sued, being too numerous; yet their treasurer might. And, as the plaintiff had refused to be nonsuited, contrary to the opinion of the judge, they granted the new trial, *without* costs.

AND, in another case, which was an action upon a promisory note, Lord KENYON, before whom the cause was tried at the sittings after last term, was clearly of opinion that the plaintiff was not entitled to recover, upon the ground that the transaction between the plaintiff and defendant, which had given rise to this note, was a fraud upon a third person: the jury, however, found a verdict for the plaintiff. Jackson v. Duchaire, B.R.H. 30 G. 3. 3 T.R. 551.

IN consequence of which a rule for setting aside the verdict had been obtained on a former day; and, now, Lord KENYON still continuing of the same opinion as at the trial, and the rest of the Court concurring in that opinion, the rule was made absolute without costs.

So if a plaintiff submit to a nonsuit out of deference and respect to the opinion of a judge at *nisi prius*, which nonsuit is afterwards set aside, as being contrary to law;—or if a verdict be set aside, for the misdirection of such judge in point of law;—the Court will grant a new trial, in either of these cases, without subjecting the party, applying for it, to the payment of the costs of the first trial. 1 Bl. 670. 2 Bl. 698. 3 Wils. 146. 338. Cowp. 297-485. 3 T. R. 553. 4 T. R. 359.

So where the declaration consisted of two counts, and, at the trial, the jury found a verdict, properly, for the plaintiff Edie and Laird v. The East India Company,

B. R. T. 1 G 3. 1 Bl. 295. S. C. 2 Burr. 1216.

upon the first count, but a verdict, upon improper evidence, and contrary to law, for the defendant, on the last; the whole verdict was set aside, and a new trial ordered *without* costs.

In delivering his opinion in this case, Lord Mansfield said, that the question of costs was very peculiar. There is a verdict in part for the plaintiff, which already carries costs for him. But, for form's sake, we must set the whole verdict aside, which is usually done upon payment of costs. But this will be giving the defendants costs, which they would not otherwise have, merely because they have obtained an improper verdict. Therefore, I think, that, under these particular circumstances, the verdict should be set aside without costs. Which was accordingly done, the other judges being of the same opinion.

Montpesson v. Randle, H. 20 G. 2. B. N. P. 328.

So where a material witness for the defendant concealed himself in the plaintiff's house, to avoid being served with a subpœna, by which means the plaintiff obtained a verdict,—the Court set it aside without costs, it being unreasonable for the plaintiff to carry the cause down to trial, when he knew the defendant could not make a defence.

Brown v. Johnson, C. B. T. 11 G. 2. Ib. 324. Vide 11 Mod. 379.

Again, there being but twenty-four jurors returned upon the panel annexed to the *venire facias*, but forty-eight upon the *habeas corpora juratorum*, the defendant made no defence, in consequence of which a verdict was found for the plaintiff; upon motion the verdict was set aside without costs, the Court saying, that the 21 *Jac.* 1. c. 13. means

only the formal words upon the writ, for there must be a panel annexed to the return.

If a verdict be obtained by an unfair manœuvre at the trial, contrary to equity and good conscience, and without a trial of the real question; as by the suppression of evidence in the possession of the party for whom the verdict was given, the court will set it aside, and make such party pay the costs.

Thus, upon a rule for the plaintiff to shew cause why a verdict obtained by him for 16*l.* should not be set aside, and a new trial ordered, upon payment of costs, the case appeared to be, Anderson v. George, B. R. P. 30 G. 2. 1 Burr. 352.

That the plaintiff had sold goods to the defendant; who paid for them by a promisory note of one *Hopeley*, which the defendant endorsed. The plaintiff demanded the money of *Hopeley*, but indulged him with further day of payment several times, till *Hopeley* broke.

The only dispute between the parties was, which of them ought to bear the loss of this note. For the plaintiff was paid, if the loss ought to fall upon him, through his neglect or indulgence in giving further credit to *Hopeley*.

There were two counts in the declaration; one for goods sold; the other against the defendant, as endorser of the note.

WHEN the cause came on to be tried, though both parties came to try the real merits of the question between them, *viz.* which should bear the loss of the note occasioned by *Hopeley*'s failure, and the plaintiff's agents had the note in court; yet finding, upon their own evidence, that the plaintiff had, repeatedly, given further credit to *Hopeley*, they resorted to a trick, and rested their case upon proving the sale and delivery of the goods, which never were disputed. The defendant could not produce the note, because it was in the plaintiff's custody; and, relying upon it's being the only ground of the plaintiff's case, the defendant had not given him notice to produce it, and therefore was not entitled to prove its contents. Lord MANSFIELD, at the trial, told them that it was an improper artifice; that no verdict could stand which was so obtained. But the plaintiff refused to produce the note, and had a verdict, of course.

THE Court—thought the plaintiff had taken an unfair advantage, contrary to equity and good conscience. That the rules of practice must be general: but he who abused them in a particular case, should not shelter a trick by regularity. The plaintiff did not want notice to produce a note he had in court, and which he had laid in the declaration as his ground of action. Besides, he took a verdict for the price of the goods, though he had received satisfaction, the evidence of which was in his own custody, and suppressed.

THEY, therefore, not only set aside the verdict, but set it aside without the payment of costs. And declared, the next

time that a party should obtain a verdict in like manner, by an unfair, unconscionable advantage, without trying the real question, they would set the verdict aside, and make *him pay the costs.*

THOUGH, in general, it is true, that the king neither pays nor receives costs, yet, in the following case, after a verdict for the crown, against the direction of the Court, upon a trial at bar, in a prosecution carried on, avowedly at the proper expence of the crown, the Court made the condition of paying the costs of the former trial part of the rule for a new one.

The Queen v. the Corporation of Bewdly, B. R. M. 1712. 1 P. Wms. 207.

A WRIT of *scire facias* issued out of the Petty Bag-office, in Chancery, to repeal the charter granted to the borough of *Bewdley, septimo Annæ reginæ.* Whereupon issue being joined, and the record transmitted into the Crown-office of the Queen's Bench, in Trinity term, *undecimo Annæ,* the cause was tried at the bar of that court.

THE points in issue were,—1st, Whether one *Thomas Smith* was duly elected bailiff on the 25th of *September,* 1707? 2dly, Whether there were a bailiff and burgesses (*i. e.* a corporation) in being at the time of granting this charter? 3dly, Whether that corporation refused this charter?

UPON the evidence, at the trial, several questions of law arose, concerning which there was some contrariety of opinion among the judges. The counsel for the defendants prayed a special verdict; and the Chief Justice, in summing

up the evidence, directed the jury to reserve the points of law; for that they were of too great moment to be determined without consideration.

NOTWITHSTANDING the Court were so doubtful of the several points of law which had arisen in the course of the cause, the jury were, however, very clear in them; and about three of the clock next morning gave a privy verdict, by which they found all the issues, generally, for the queen, and affirmed it at the bar about ten; and, though they were sent out again by the Court, persisted with great obstinacy.

IN consequence of which the defendants, afterwards, moved that the verdict might be set aside, on the ground, that the jury had found matter of law, and also brought in their verdict contrary to the direction of the Court. And after advice with the justices of *C. B.* and barons of the Exchequer, the Lord *Chief Justice* (PARKER) delivered it as the opinion of all the judges of *England* (except POWELL,) that where the defendant's counsel pray a special verdict, and the Court direct the jury to find one, if the jury will take upon them to go contrary to that direction, and find matter of law, it was a sufficient ground for a new trial, even after a trial at bar.

THE counsel for the queen then insisted, that this verdict being set aside for a misbehaviour of the jury, and not any fault in the prosecutor, costs ought to be allowed. The rule, accordingly, was, that the last trial should be set aside, on payment of costs.

About three days after this rule for a new trial was pronounced, the defendants moved, that some person might be named to receive the costs, it not appearing, certainly, who was the prosecutor in this cause.

Whereupon the Attorney General named *Borret*, the queen's solicitor, and acquainted the Court, that the prosecution was carried on at the proper expence of the crown.

After the costs had been taxed, Mr. *Lechmere* made a motion, upon notice, against the taxation of costs in general, and against some *items* allowed by the master in particular.

He insisted that though they had submitted to a rule for the payment of costs, when the cause appeared, even upon the plaintiff's own shewing, to be merely a contention between the old and new corporations, upon the validity of their several charters; yet now it appeared in a different light, and was owned by the Attorney General as a government prosecution, carried on at the charge of the crown, they ought not to be estopped by that rule, from making it a question, whether in the case of the crown, costs are due by law, this being the first time they took advantage of that point? *Quod fuit concess. per Cur.*

To prove that in cases of the crown, or such as are properly government prosecutions, costs are not due, he urged the course of the Exchequer, where costs are never paid, unless there be a relator, or some other security to answer costs to the party; which there was not in this case, nor could

there be, because the prosecution was *in rem*, and not *in personam*; and for that he produced a manuscript of baron *Lechmere*.

THAT, on the crown-side in this court, costs had been so far from being allowed in any case that it had been thought necessary to provide by (*a*) act of parliament, that there should be a recognizance given to answer costs in some particular cases; but this was none of those; that the law had provided no judgment, nor process for costs, nor method to bring them into the Exchequer.

(*a*) Vide 4 and 5 W. and M. c. 18.

THAT, if it were otherwise, it would be very unequal; for the queen paid no costs for not going to trial; nay, Mr. Attorney might enter a *noli prosequi*; or a *cesset processus*, even when the jury were ready to give their verdict at the bar, without costs to the subject.

IN the case of the Queen v. *Collins* (*Michaelmas* 10 *Ann.*) in an information for a battery upon a custom-house officer in the execution of his office, a motion was made for costs for not going on to trial; and upon Mr. *Harcourt*'s affirmation that no costs were ever allowed in government prosecutions, the same was denied.

THAT in the case of the Queen v. *Clark*, which was an information for a nuisance, *viz.* for erecting copper-mills upon the river *Thames*, there was a verdict for the queen, which by consent was set aside upon payment of costs; the second verdict was for the defendant, who thereupon moved for costs,

which were denied for this reason, (*scil.*) because the statute of the 24 *H.* 8. c. 8. extends only to trials by *nisi prius*, and not at the bar, as it was in that case.

So in *Hil.* 3 *W.* and *M.* in *Scacc.* in my Lord *Montgomery*'s case, which was an inquisition on his estate, and but in the nature of an ejectment, there was a verdict for the defendant, and a new trial granted without costs.

THAT here was no prerogative in the case; for the queen and subject were on an equal foot; and if the queen did not pay costs, she ought to receive none.

THAT this verdict was set aside as unjust, for a misbehaviour of the jury in the face of her majesty, who was supposed to be always present in her Court of Queen's Bench, which court saw plainly, no just judgment could be entered upon that verdict, and yet the defendants were told, that this injustice must be fastened upon them, unless they paid two or three hundred pounds, to be delivered from it; surely this was to pay for justice contrary to *magna charta*, which says, *nulli vendemus justitiam*.

THAT in capital cases, if a jury should obstinately find *generally*, where the court had directed them to find the matter *specially*, the court, no doubt, would set aside such verdict, and that without costs; they would not take away the life of a man, because he had not money to pay the costs to the crown.

Now the consequence of this suit was of equal concern to this corporation, as that of a capital prosecution, to the life of

a particular person; for the very life and being of this corporation were in question; and if costs were once admitted in the case, those writs of *scire facias*, though they had not yet so harsh a sound in the ears of *Englishmen*, yet, he would undertake to prove, that they would have ten times more pernicious effects than *quo warranto's* of old; for a judgment in a *quo warranto* did not destroy the franchise, but a corporation might still, notwithstanding that, have another struggle for it's liberty; but in the case of a *scire facias*, the judgment was a repeal of the charter; and if a jury could for once be so managed, as to give a partial verdict, it was but getting those costs taxed as a poor borough was not able to pay, and the business would be done; they could not pay the costs, and without that, they should not have a new trial in order to come at right and justice.—This was *laying the axe to the root of the tree*.—The crown indeed was always an unequal match for the subjects: but if the weight of costs were thrown into the scale, this would become such an addition, as would make it's prosecutions heavier than they would be able to bear.

11 Mod. 379. But Powell, *Justice*, being absent, during this argument, the other judges would not reverse a rule, made when the court was full, which granted a new trial on payment of costs, *nisi*, &c. The Court, however, enlarged the rule, till the first day of *Hilary* Term peremptorily, when, they said, they should have considered the law on that point; and that if they should be of opinion for payment of costs, the same should be paid in three days after, or judgment should be for the queen upon the general verdict.

I have not been able to meet with any printed account or

report of what fell from the Court, when they gave their final opinion upon this point, but, by the records in the Crown-office, it appears that the defendants were ordered to pay the costs of the first trial, and that, afterwards, on a new trial, the jury found a special verdict.

1 Cox's P. Wms. 227. n. (†)

WHERE, in the rule for a new trial, nothing is said about the costs of the former, and they are not reserved to abide the event of the second verdict, although the second trial terminate in favour of the same party as the first, he shall not have the costs of the first.

Mason v. Skurray, B. R. T. 20 G. 3. Doug. 2 Ed. 438. S. P. Schulbred v. Nutt, B. R. M. 23 G. 3. Ibid. n. († 101.)

IN this particular, the rule of practice in the King's Bench varies from that adopted in the Common Pleas; for in the latter court, where a cause has been twice tried, and the *same* party, who succeeded on the first trial, gains a verdict also upon the second, he is allowed the costs of *both* trials. But where the first verdict is for the plaintiff, and the second for the defendant, or *é converso*, there the costs of the former trial are *not* allowed.

THUS, an action of trespass having been tried at *Croydon* by a special jury, and a verdict found for the defendant, in the next term, a motion was made for a new trial, on the ground of the verdict being contrary to evidence, and a new trial was, accordingly, granted, the rule being silent as to costs.

Parker v. Wells, C. B. P. 25 G. 3. H. Bl. 639. n. (b.)

IT was tried a second time in *Middlesex*, by a special jury, and a verdict again found for the defendant. An application

being again made for a new trial, in order to have a special verdict, to take the opinion of the Court of King's Bench on the point of law which arose,

THE Court, with the consent of the parties, and to save expence, instead of granting a new trial, made a rule that judgment should be entered for the plaintiff, with one shilling damages; and that a special verdict should be agreed upon.

IN taxing the costs on the *postea*, the prothonotary disallowed the costs of the first trial, and of the rule granting a new trial; with which the plaintiff's attorney being dissatisfied, applied to the Court for a rule to review the taxation.

LORD LOUGHBOROUGH, *Chief Justice*,—at first seemed to think the costs of the first trial ought to have been allowed, but directed the prothonotary to inquire and report what was the practice in the King's Bench. Upon inquiry, it appearing, that, in the King's Bench, the costs of the first trial were not allowed, even where the second verdict followed the first, the Court said, that the prothonotary had done right, and refused the rule.

Trelawney, v. Thomas, C. B. P. 31 G. 3. H. Bl. 641.

So, in a subsequent case, where there had been two trials, and a verdict in each for the plaintiff, although the rule for the second trial was entirely silent as to the costs of the first, the prothonotary allowed the plaintiff the costs of both trials. But it was now moved, that the taxation might be set aside; on the ground that Mr. *Justice* WILSON, before whom the

first trial was had, when the second trial was moved for, stated his opinion, that he ought to have nonsuited the plaintiff, and that the second trial was granted under that impression on all parties. But,

THE Court held that ground to be insufficient, and refused the rule; at the same time confirming the practice abovementioned, in *Parker* v. *Wells*, that where there are two trials, and the verdicts are the same way in each, the party in whose favour they are found is entitled to the costs of both trials; but where the verdicts are different ways, there the costs of the former trial are not allowed. Rule refused.

IF, on arguing a special case reserved, the Court are of opinion, that some of the facts stated afford grounds for suspecting fraud in one of the parties, and therefore send the case down to a second trial, without saying any thing concerning the costs of the first trial, the successful party on the second trial is not entitled to the costs of the first; this case falling within the general rule in the King's Bench, that where, on sending a cause down to be tried, nothing is said respecting the costs, the party succeeding on the second trial is not entitled to the costs of the first.

Hankey and others, assignees of John and Benjamin Vaughan, v. Smith and others, B. R. M 30 G. 3. 3 T. R. 507.

Davila v. Herring, B. R. P. 6 G. 1. 1 Str. 300. Semb. contra.

WHERE, in the rule for a new trial, nothing is said concerning the costs of the first, and upon such second trial a juror is withdrawn, on the party, who obtained the verdict at the first trial, undertaking, generally, *to pay the other party his costs*, such an undertaking extends only to the costs of the second trial.

Rouse, v. Bardin, C. B. P. 31 G. 3. H. Bl. 639.

SECT. II.

Of Costs, where a Plaintiff neglects, after Issue joined, to bring a Cause on to Trial, according to the Practice of the Court.

THE 14 *Geo.* 2. c. 17. s. 1. after reciting, that many great inconveniences have arisen to the subjects of this kingdom, by means of the delaying the trials of causes between party and party after issue joined, enacts,—"That where any "issue is or shall be joined in any action or suit at law, in any "of his majesty's courts of record at *Westminster*, the Court "of Great Session for the principality of *Wales*, the Court of "Great Session for the county palatine of *Chester*, the Court "of Common Pleas for the county palatine of *Lancaster*, or "the Court of Pleas for the county palatine of *Durham*, and "the plaintiff or plaintiffs in any such action or suit hath or "have neglected, or shall neglect, to bring such issue on to "be tried, according to the course and practice of the said "courts respectively, it shall and may be lawful for the judge "or judges of the said courts respectively, at any time after "such neglect, upon motion made in open court (due notice "having been given thereof), to give the like judgment for "the defendant or defendants in every such action or suit, as "in cases of nonsuit, unless the said judge or judges shall, "upon just and reasonable terms, allow any further time or "times for the trial of such issue; and if the plaintiff or "plaintiffs shall neglect to try such issue within the time or

If, after issue joined, a plaintiff neglect to bring it on to trial, according to the course of the court, judgment, as in the case of a nonsuit, may be given against him.

" times so allowed, then, and in every such case, the said " judge or judges shall proceed to give such judgment as " aforesaid."

14 *Geo.* 2. c. 17. s. 2. " Provided always, that all judg- " ments given by virtue of this act shall be of the like force " and effect as judgments upon nonsuit, and of no other force " or effect."

Judgments given by virtue of this act, to be of like force as those upon nonsuits.

14 *Geo.* 2. c. 17. s. 3. " Provided also, that the de- " fendant or defendants shall, upon such judgment, be " awarded his, her, or their costs, in any action or suit, " where he, she, or they would, upon nonsuit, be entitled to " the same, and in no other action or suit whatsoever."

And upon such judgments, defendants shall have costs, in actions where they would have had them upon nonsuits.

A *qui tam* action, where no part of the penalty is given to the crown, is within this statute; but if there are several defendants, they must all join in the application for judgment, as in the case of a nonsuit, otherwise it cannot be granted.

Barnes, 315.

As where, upon a rule to shew cause, why judgment as in the case of a nonsuit should not be given, it appeared that this was an action *qui tam* by a common informer, against three defendants, for a penalty under one of the statutes for the preservation of the game; that all the defendants had joined in the plea, but that only two of them had joined in the application for this rule.

Watson, *qui tam*, v. Jackson and two others, B. R. H. 25 G. 2. Say, Rep. 22. S. C. 1 Wils. 325. The report of this case by Wilson is extremely short, and makes no mention of the second point, noticed by Sayer, but says that the rule for

Upon which two questions arose; 1st, Whether the 14 *Geo.* 2. c. 17. extended to this species of action? 2dly,

judgment as in case of a nonsuit was made absolute.

Whether, as one of the defendants had not joined in applying for the rule, judgment as in the case of a nonsuit ought to be given?

THE former of these points was determined in the affirmative, and the latter in the negative.

AND by the Court,—As no part of the penalty, for which this action was brought, is given to the king, it is, notwithstanding a moiety thereof is given to the poor of the parish, wherein the offence was committed, an action between party and party. But as all the defendants have joined in pleading, and one of them has not joined in the application for judgment as in the case of a nonsuit, the Court ought not to give such judgment.

THE doctrine laid down upon the second point in the last case, was recognized and confirmed in a subsequent decision.

Jennings, *qui tam*, v. Wilson and two others, B.R.T. 27G.2. Say. Rep. 103.

THE case was; in a *qui tam* action against three defendants, one of them did not appear, but the other two, having appeared and pleaded, afterwards joined in an application for judgment as in case of a nonsuit.

BY the Court,—It has been said, that this case differs from that of *Watson* v. *Jackson*, inasmuch as one of the defendants, who had appeared and pleaded, did not in that case join in the application. But there is no reason for the Court to depart, on account of this difference, from what was then

holden; for the ground of the opinion of the Court in that case was, that, unless all the defendants in an action apply for judgment as in the case of a nonsuit, the Court ought not to give such judgment. It has been said, that if judgment as in the case of a nonsuit cannot be obtained, because one of the defendants in an action has not appeared, a vexatious plaintiff may always make some friend a defendant, upon whom he can prevail not to appear, in order to prevent the obtaining of such judgment by the defendants who have appeared. But this argument does not hold stronger in the present case, than it would have done in the case of *Watson* v. *Jackson*; it being just as easy for a vexatious plaintiff to make some friend a defendant, upon whom, if he do appear, he can prevail not to apply for judgment as in the case of a nonsuit, as it is to make some friend a defendant, upon whom he can prevail not to appear. Rule discharged.

JUDGMENT as in the case of a nonsuit may be given upon a traverse of the return to a writ of *mandamus*.

of Stafford, P. 32 G. 3.

The King, on the prosecution of T. Allen, v. the Mayor, &c. 4 T. R. 689.

THUS, upon motion for judgment as in case of a nonsuit, it appeared, that a material fact contained in the return to a *mandamus* was traversed, and that issue was joined upon the traverse.

Wigan v. Holmes, B. R. M. 27 G. 2. Say. Rep. 110.

WRIGHT, *Justice* (LEE, *Ch. J.* being absent), at first had some doubt whether the 14 *Geo.* 2. c. 17, extended to a case like the present.

BUT it was observed by DENISON, *Justice*, that it is by the 9 *Ann.* c. 20. declared, that if any material fact contained in a return to a *mandamus* shall be traversed, such further proceedings shall be had thereupon, as if an action had been brought for a false return.

A RULE was made to shew cause, which, no cause being shewn, was, afterwards, made absolute.

WHERE, in a *joint* action, there is judgment by default against one defendant, the other cannot obtain judgment as in case of a nonsuit, if the plaintiff neglect to proceed to trial according to the practice of the court.

Weller v. Goyton and Walker, B. R. T. 30 and 31 G. 2. 1 Burr. 358.

THUS where, in an action against two upon a joint-promise, there was judgment against one of the defendants by default, and issue joined by the other. The plaintiff having neglected to proceed to trial, the common rule was obtained, for judgment as in case of a nonsuit.

THE master having a doubt, whether he could tax costs as in case of a nonsuit, as there was a judgment by default for the plaintiff, against the other defendant, a motion was made for the direction of the Court as to this point.

LORD MANSFIELD (though no counsel appeared on behalf of the plaintiff) had a doubt whether there could be judgment as in case of a nonsuit, in a case where the plaintiff was not liable to a nonsuit. The act of the 14 *Geo.* 2. c. 17.

enacts, that all judgments given by virtue of it, shall be of the like force and effect as judgment upon nonsuit, and of no other. And provides that the defendant or defendants shall, upon such judgment, be awarded, his, her, or their costs, in any action or suit, *where he, she, or they would upon nonsuit be entitled to the same*; and in no other action or suit whatsoever. So that the point seems to be, whether the plaintiff *could*, in this case, have been nonsuited at the trial; for if he could not, then the case of a nonsuit does not here exist; and, consequently, the court cannot give judgment and costs, as in case of a nonsuit, when the case of a nonsuit does not at all exist. Now here was a judgment obtained by the plaintiff against one of the defendants already: how then can the plaintiff be out of court as to *him*? But if he be nonsuited in this action, he will be out of court, as against *both* defendants.

Mr. *Justice* DENISON seemed also to think, that the plaintiff would not have been liable to a nonsuit at the trial. Nothing was taken by the motion. Cowp. 485. 3 T. R. 662.

THE Court will not grant a motion for the like judgment as in case of a nonsuit, and that the master should tax the costs for the plaintiff's not proceeding to trial according to notice, not countermanded; because costs in these two cases, are founded on different rights, and, therefore, ought not to be blended together. Earl of Leicester v. Wooden, M. 21 G. 2. 1 Cro. Pract. 253. B. N. P. 336.

WHERE a plaintiff, having given notice of trial, neither pro-

ceeds pursuant thereto, nor countermands it in proper time, it is optional in the defendant either to apply for judgment as in the case of a nonsuit, or for costs on account of the plaintiff's not going to trial according to his notice. But he cannot have both these remedies; therefore, having obtained a rule for judgment as in the case of a nonsuit, the defendant cannot, afterwards, have costs for not going on to trial, not even in a species of action, in which he is not entitled to costs upon such judgment; so, *vice versâ*, after obtaining a rule against the plaintiff for costs for not proceeding to trial pursuant to notice thereof, the defendant is not entitled to judgment as in case of a nonsuit.

Newman v. Goodman, C. B. T. 16 G. 3. 2 Bl. 1110.

Honiwell v. Blatchford, T. 16 G 2. Barnes, 131. S. P. Guy v. Wilkinson, Ogle v. Moffit, Ibid. 314. 316.

Upon a motion for judgment as in the case of a nonsuit, the judges may, under the 14 *Geo.* 2. c. 17, allow the plaintiff, on just cause and reasonable terms, any further time or times for the trial of the issue. And where the Court, on an application for this judgment, grants the plaintiff further time, it is uniformly on the payment of costs for not proceeding to trial, unless the notice of trial was countermanded in time, together with the costs incurred by the motion. However, if the cause shewn in extenuation of the plaintiff's neglect be sufficient, the Court will not subject him to the payment of the costs of the application.

Earl of Leicester v. Wooden, 1 Cro. Pr. 253. B. N. P. 336.

Jones v. Stephenson, Smith v. Gregg, Barnes, 316. 464. Hamp v. Cuming, Ib. 498.

In general, where there has been but one notice of trial, the Court of King's Bench will discharge a rule for judgment as in case of a nonsuit, on a plaintiff's undertaking, peremptorily, to try the cause at the next sittings, or next assizes,

Imp. Pr. K. B. 3 Ed. 237.

as the case may be; but if there have been two notices of trial, or but one, in case it is a penal action, some real excuse must be shewn for the plaintiff's neglect. And it is said, that the Court of Common Pleas will, in no case, consider a mere peremptory undertaking to try at the next sittings, or assizes, as an answer to a motion for the like judgment as in the case of a nonsuit.

Imp. Pr. C. B. 2 Ed. 310.

THE plaintiff's own illness;—the marriage of a *feme* plaintiff, after issue joined;—the non-attendance of a bankrupt to be examined, pursuant to a summons for that purpose, by the plaintiffs, his assignees, relative to the debt for which the action was brought, and a set off insisted upon by the defendant;—the illness of two of the plaintiff's witnesses;—the offer by the plaintiff's attorney, to enter the record at the assizes, a little out of time, and the refusal of the defendant's attorney, then present, that it should be received;—the insolvency of the defendant, happening after the action brought;—have been adjudged good causes against judgments as in cases of nonsuit.

Clarke v. Gorrill, Barnes, 313. Vile, Wid. v. Daw. Ibid. 314. Milton and another, assignees, v. Terrill, Ibid. 315. Jones v. Stephenson, Ibid. 316. Smith v. Gregg, Ibid 464. Bailly v. Wilkinson, P. 21 G. 3. B. R. Doug 2 ed. 671.

So where, on a rule to shew cause, why there should not be judgment as in the case of a nonsuit against the plaintiff, the circumstances were, that the plaintiff had obtained rules for a special jury and a view, that in pursuance thereof a view had been had, but by four jurors only; that the cause was entered for trial at the assizes, and the plaintiff ready to proceed, but it could not be tried, for want of the defendant's consent, because a view had not been had by six of the jurors; the Court discharged the rule, saying, that the plaintiff had

Hamp v. Cuming, P. 27 G. 2. Barnes, 498.

affected no delay, and it was not his fault that the view was incomplete.

BUT the discovery of a mistake in the declaration, after a peremptory undertaking to try the cause at the next assizes, is not a good cause against judgment as in case of a nonsuit.

Battie v. Brown, B. R. H. 26 G. 2. Say. Rep. 74. Vide Barnes, 317. 318.

THUS, upon shewing cause against a rule for judgment as in case of a nonsuit, it appeared, that a similar rule for this judgment had been before discharged upon an undertaking of the plaintiff peremptorily to try the cause at the next assizes, but, after this undertaking, a mistake having been discovered in the declaration, the cause was not tried. And that the plaintiff had, before the present rule was moved for, given notice to the defendant of a motion for leave to amend the declaration.

BY WRIGHT and DENISON, *Justices*, (LEE, *Ch. J.* being absent)—The plaintiff ought to have been satisfied that his declaration was right, before he undertook peremptorily to try the cause.

BUT FOSTER, *Justice*, said, that it would, in his opinion, be rather too rigid a construction of the statute to hold, that the plaintiff, under the circumstances of this case, was obliged to try his cause at the next assizes. Rule absolute.

Manby v. Wortley, C. B. M. 19 G. 3.

NEITHER is the want of a term's notice of the motion, where no proceedings have been had in a cause for a twelve-

month, a good cause against judgment as in case of a nonsuit; because the general rule (1) of court, making such a notice requisite where no proceedings have been had for four terms, extends only to the party's intent to proceed, and not to motions to end proceedings; and, moreover, being made before the statute, it cannot be construed to extend to motions of this sort. But, in *Manby* v. *Wortley*, upon hearing the merits, the rule for judgment as in case of a nonsuit, was discharged on the usual terms.

2 Bl. 1223. Roe v. Dunning, M. 18 G. 2. Barnes, 308. (1) Reg. P. 13 G. 2. C. B.

WHERE a plaintiff has carried a record, down for trial once, there shall not be judgment as in case of a nonsuit, for not carrying it down a second time, even though it be made a remanet the first time; the plaintiff having complied with the terms of the statute of 14 *G.* 2. c. 17. by carrying the record down to trial once, and the defendant might, if he had pleased, have, afterwards, carried it down by proviso.

King v. Pippet, B. R. M. 27 G. 3. 1 T. R. 492. Mewburn v. Langley, B. R. H. 29 G. 3. 3 T. R. 1.

So, upon the same principle, where a plaintiff has once proceeded to trial, there cannot be judgment as in case of a nonsuit against him, for not proceeding to a new trial.

Porzelius v. Maddocks, B. R. H. 29 G. 3. H. Bl. 101.

THE statute of the 14 *Geo.* 2. c. 17. entitles a defendant to costs upon a judgment as in case of a nonsuit, only where he would have been entitled to them upon a nonsuit. Therefore, as an executor or administrator is not liable to costs upon a nonsuit, he is not subject to them upon a judgment against him as in the case of a nonsuit. And, for the same reason, where a plaintiff in a writ of right has judgment as in the case of a nonsuit given against him he is not liable to costs.

Howard, executor, v. Radburn, H. 15 G. 2. Barnes, 130.

Newman v. Goodman, C. B. P. 16 G. 3. 2 Bl. 1093.

Ifield v. Weeks C. B. P. 29 G. 3. H. Bl. 222.

Vide 2 Bl. 798.

ALTHOUGH a plaintiff has undertaken peremptorily to proceed to trial at the next assizes, yet it is still necessary for him to give *notice of trial*, and without receiving such notice the defendant is not bound to attend at the assizes, and be prepared with witnesses, &c. And, therefore, where after such an undertaking by the plaintiff, the defendant, without receiving any notice of trial, attended at the assizes, subpœnaed witnesses, feed counsel, &c. in expectation that the plaintiff would try the cause, it was holden, that he ought not to have the costs of such attendance and preparation, though he obtained judgment as in the case of a nonsuit, on account of the plaintiff's not proceeding to trial.

SECT. III.

Of Costs for not proceeding to Trial pursuant to Notice.

2 Bl. 1110.

COSTS for not proceeding to trial do not depend on any act of parliament, but on the practice and rules of the courts.

Reg. M. 1654. B. R. Sec. 18. R. M. 1654. C. B. Sec. 21.

BY which if a plaintiff give notice of trial, and proceed not thereto, the defendant, upon motion, shall have the costs of his attendance, unless the plaintiff give the defendant warning in convenient time, that he will not proceed, or shew good cause to be allowed by the court, in excuse of such costs.

In country causes, and in town causes, where defendant lives

THE 14 *Geo.* 2. c. 17. s. 5. enacts, "That in case any "party or parties shall have given notice of trial in any in- "dictment, information, or cause whatsoever, at *nisi prius*

" before any judge or justice of assize, or *nisi prius*, or at " the sittings in *London* or *Middlesex*, where the defendant " or defendants reside above forty miles from the said ci- " ties respectively, and shall not afterwards duly counter- " mand the same in writing, at least six days before such " intended trial, every such party shall be obliged to pay " unto the party or parties to whom such notice of trial shall " have been given as aforesaid, the like costs and charges as " if such notice of trial had not been countermanded."

above 40 miles from London, notice of trial must be countermanded in writing at least six days before trial, otherwise plaintiff liable to costs.

If the venue be laid in either *London* or *Middlesex*, and the defendant reside within forty miles of *London*, in order to save costs for not proceeding to trial conformably to notice, the countermand of such notice must be delivered in writing at least *two* days, exclusive of the day upon which it is given, before the intended trial.

2 Str. 849. B. R. H. 369. Imp. Pr. K. B. 3 Ed. 233. ——C. B. 2 Ed. 302. Burt. Pr. Exch. 231. Reg. M. 4 Ann. B. R. n. (c)

Although a plaintiff be prevented from proceeding to try the cause by the defendant's entering a *ne recipiatur*, yet he shall pay costs for not going on to trial pursuant to notice, because it was his own neglect, that the record was not entered within the time allowed by the practice of the court for that purpose.

Duell v. Stow, M. 4 G. 2. Cas. Pr. C. B. 60. S. C. Pract. Reg. C. B. 406. Vide Barnes, 464.

But a plaintiff is not liable to costs for not trying the cause according to notice, where the delay is not the result of any *wilful laches*, but of inevitable accident; neither shall he pay costs, in such case, where the neglect of the defendant's attorney is the cause of the trial being delayed.

Thus a rule for the plaintiff to pay costs for not proceed-

Ogle, executor, v. Moffit, M. 17 G. 2. Barnes, 138.

ing to trial at last *Northumberland* assizes, according to notice, was discharged; it appearing, that the cause was entered with the marshal, that one material witness was served with a subpœna, and could not attend, and another was disabled by a fall from his horse. For here the plaintiff had been guilty of no wilful default; if he had, he must have paid costs, even though he sued as executor.

Strong v. Harwood, C. B. H. 16 G. 3. Say. Costs, 174.

So where, upon a rule to shew cause, why the plaintiff should not pay costs, for not proceeding to trial pursuant to notice, the circumstances were, that, after notice of trial had been given, the defendant moved for a special jury, that forty-eight persons were nominated by one of the prothonotaries; and that the defendant's attorney neglected to strike out twelve of them. The question being referred to the prothonotaries, they reported, that, as the not proceeding to trial was occasioned by a neglect of the defendant's attorney, in not attending to strike out twelve of the persons nominated, the defendant was not, in their opinion, entitled to costs. Upon which report, the rule was discharged.

Hester v. Hall, M. 16 G. 2. Barnes, 307. Goodright v. Hoblyn, T. 8 and 9 G. 2. Barnes, 298. S. C. Pract. Reg. C. P. 393.

If a notice of trial be regularly countermanded, the defendant is not entitled to receive the costs of a witness who resided in *London*, and, before the countermand was delivered, set out to attend the assizes in the country.

Sed quære.

Yet it is laid down in 12 *Mod.* 560. that, if, upon notice of trial, the defendant draws briefs, retains counsel, and makes ready his witnesses, before that notice is countermanded, upon affidavit thereof, and motion, he shall have such costs as the master shall tax.

IN an action of ejectment, the rule is, that the lessor of the plaintiff shall pay the costs taxed for not going on to trial agreeably to notice, although by the general rules of the law, in other cases, he, who brings the action, ought to pay them. Per Holt, Ch. J. Comb. 102.

IT was agreed by the judges in the *Treasury*, that the prothonotary may tax costs for not going on to trial, at discretion. Anon. M. 4 G. 1. Pract. Reg. C. P. 404.

IF the plaintiff give notice of trial, but do not proceed to trial, nor countermand the notice in due time, whereby costs are taxed for the defendant, and, afterwards, he deliver a fresh notice of trial, the court will not stay the trial until the firsts costs are paid, in any action, except that of ejectment, because the defendant has another remedy for them, namely, by attachment. And if the plaintiff should not try the cause pursuant to his second notice, the defendant will again have costs, and the like remedy to obtain them. Reg. M. 4 Ann. B. R. n. (c) Andr. 17. Burt. Pract. Exch. 232. Sed vide Theedam v. Morris, Burt. Pract. Exch. 237. where the plaintiff was ordered not to proceed to trial, till he had paid the costs taxed for his not going on to trial at a former sittings.

AND, in one case, the court refused to grant a rule to stay proceedings in an action of trespass, brought by a tenant against his landlord, for a distress, until the plaintiff had paid the costs for not going on to trial according to notice, even though it appeared, that the plaintiff was a necessitous person, and absconded. Wareing v. Potter, B. R. T. 10 and 11 G. 2. Andr. 17.

HOWEVER, where a defendant had given a notice of trial by proviso, but neither countermanded the same, nor proceeded pursuant thereto, and then gave another notice of Walter v. Packer, M. 2 G. 2. Pract. Reg. C. P. 405.

trial by proviso, the Court of Common Pleas made a rule for staying proceedings till the defendant, who was a *pauper*, had paid the costs taxed for the plaintiff, on account of the cause not being tried according to the first notice.

Reg.M. 4 Ann. B. R. n. (c) Wilkinson v. Poole, 2 Str. 797. 1 T. R. 696.

If a defendant do not proceed to trial by proviso, pursuant to his notice, nor countermand the same in due time, the plaintiff is entitled to costs.

Reading v. Gralton, Pract. Reg. C.P. 405.

And if the defendant give notice of trial by proviso, and the plaintiff also give notice of trial, and neither of them proceed to trial, or countermand, each party shall have costs taxed against the other for their respective defaults.

SECT. IV.

Of Costs, for not proceeding to the Execution of a Writ of Inquiry pursuant to Notice.

3 Keb. 729. Barnes, 118. 123. Cas. Pr. C. P. 86. Pr. Reg. C. B. 448. 2 Freem. 435.

Formerly, a defendant was not entitled to costs, where the plaintiff neglected to proceed to execute a writ of inquiry according to notice.

But as it is equally reasonable that a defendant shall have any costs which he may have incurred, by reason of the plaintiff's not proceeding to the execution of a writ of inquiry pursuant to notice, as that he shall have such costs, where the plaintiff does not go on to trial according to notice, the practice of the courts has been very equitably altered in this

respect. And it is now the uniform rule, in all the courts of *Westminster Hall*, to allow costs to the defendant, on account of the plaintiff's neglecting to execute a writ of inquiry of damages conformably to notice, or to countermand the same in due time.

1 Str. 317. 2 Str. 728. Reg. H. 8 G. 1 B. R. n. (a) Barnes, 230. Reg. T. 13 G. 2 C. B. Burt. Pr. Exch. 253.

SECT. V.

Of Costs, where a Matter in Controversy is submitted to Arbitration.

An arbitrator may award costs, without any express authority for that purpose.

Therefore, in answer to an objection taken to an award, made in a cause referred to arbitration by rule of court, on the ground that the umpire had awarded costs without an express power so to do, the Court said, that the power of awarding costs was necessarily consequent to the authority conferred upon the arbitrator of determining the cause; and that the reason why, in references of this sort, a provision was, frequently, inserted, that the costs should abide the event of the award, was, that the arbitrator might not have it in his power to withhold costs from the party, who was in the right. But that was to be considered as the restriction of a power, which he would, otherwise, necessarily have, of allowing costs at his election.

Roe on the Dem. Wood v. Doe, B. R. M. 29 G. 3. 2 T. R. 644.

And, arbitrators possessing this power, inherent in their office, of allowing the costs of the suit referred to them, it has

6 Mod. 195. Salk. 75. 1 Sid. 358. Barnes, 166. been holden, that they may delegate it to the proper officer of the court wherein the suit is pending; that is, they may award, that one of the parties shall pay to the other *costs to be taxed by the master, or prothonotary.* And the reason

B. R. H. 181. seems to be, that, as arbitrators are judges between the parties, and, as it were, put in the place of the court by the parties, and possessed of the same power as the court of giving judgment for costs, they may refer the taxation of such costs to the same officer as the court would do.

BUT they cannot award, that one of the parties shall pay to the other what costs two persons named in the award, but not officers of any court, shall appoint; for they can only delegate their authority, in this instance, to one, who, the court will take notice, understands the subject better than themselves.

Nott v. Long, B. R. M. 9 G. 2. B. R. H. 181. S. C. 2. Str. 1025. THUS to an action of debt upon an arbitration bond, the defendant pleaded *nul* award; plaintiff replied, and set forth an award, which amongst other things, awarded that the defendant should pay the plaintiff such sums as *James Willis* and *John Godfrey* should settle for costs, having regard to such costs as were usually taxed by masters in Chancery, and then mutual releases awarded, and that the said J. W. and J. G. settled the sum of to be due for costs, in which they had regard, &c. and so assigned a breach in nonpayment of these costs; to which replication the defendant demurred.

THIS case was twice argued at the bar;—after the first argument, the judges delivered their opinions, as follow.

LORD HARDWICKE, *Chief Justice*.—One would go as far as possible to support awards, where there is no objection to their being fairly made; but I doubt if this award be good. It is true, in the case of *Winter* v. *Garlick*, it was held that the arbitrators might award the party to pay the costs to be taxed by the master, and even that is going beyond the general rule; but there the costs were referred to be taxed by the master; whereas here, for ought that appears to the contrary, the taxation is referred to persons who are ignorant of the matter; and the cases cited, are not contrary to this, for they are, where costs were awarded generally, which I think is well enough, for then they will be referred to the proper officer. Tr. 8 G. 2. 6 Mod. 195. Salk. 75.

PAGE, *Justice*, was of the same opinion.

PROBYN, *Justice*,—inclined to think the award good, and that the arbitrators might as well appoint these two persons, as the master, for it was no more than taking them to their assistance.

LEE, *Justice*.—I think this is a direct delegation of their authority; and he cited the case of *Robinson* v. *Barnsley*, last *Hilary* Term, where an award that the party should give security fourteen days after their time was expired, was held to be bad. These persons must be considered as their delegates, and in case of a private authority, it is a settled rule, that they must execute it themselves, and cannot delegate it. Indeed it may be different when referred to be taxed by the

master, because that is the settled way of taxing costs by the law of the land.

And now this term all the Court agreed that the award was bad.

Lord Hardwicke.—As to awards there are three rules; 1st. That the arbitrators must make a final end, so as the parties may have the fruits of it, without suit. 2dly. That they cannot delegate their authority. 3dly. Their award must be made within the time limited. Now this award does not make a final end, for here is a matter to be done after the time expired; but it is said that as to costs to be taxed, that is allowable; and it is true, it has been allowed to be referred to the proper officer, as in *Winter* and *Garlick*, but it is there expressly said, they must be settled by the arbitrators, or by the master; and that is reasonable enough, because the reference to the proper officer makes an end of it, for he is subject to the authority of the court, who, if he errs, can amend his errors summarily, but if referred to strangers, the court cannot intermeddle. 2dly. The arbitrators must execute their authority themselves, which they have not here done. Indeed a distinction has been taken between judicial and ministerial acts; but this is not a mere ministerial act, and appears not to be so, from the penning of this award, for they are directed to have regard to such costs as a master would allow, which is, certainly, an act of judgment. But when the reference is to the master, it is in the eye of the court; suppose these two persons had been mistaken as to what costs should be

allowed, how could it then be settled but by a trial before a jury upon averment, that it was so, or was not so? And this is no inconvenience, for they might have, within the time limited, had the assistance of these two men in this matter, and have made it part of their award.

LEE, *Justice*.—By *Cro. Jac.* 315. 584. the arbitrators cannot reserve authority to themselves after the time of the submission. *Jenk. Cent.* 128. If the award be to release to another, by the advice of *J. S.* it is good; and the reason given is, because that reference is only for the execution of the arbitrement; for he lays it down as a rule, that the arbitrators cannot delegate their authority. It is true, that in cases of costs it has been allowed to refer to the master, and the reason is, because they have then made an award of costs in the same manner as costs are usually given. *Comb.* 456. award, that if the plaintiff make out before a judge, any disbursements laid out for the defendant, the defendant should pay them likewise, held bad. And HOLT there said, they have no liberty to do any future act unless it be by referring the matters in difference to a master of a court to tax costs, which is agreeable to what he said in *Winter* v. *Garlick*. Reference to the master is a proper execution of the arbitration, and is, merely, ministerial, but a reference to a stranger is judicial.

JUDGMENT for the defendant.

ARBITRATORS may award a gross sum for costs, for they

are not bound to refer the taxation of costs to the officer of the court.

Shepherd v. Brand, B. R. T. 7 G. 2. B. R. H. 53.

For where, on a motion to set aside an award made on a rule of reference to the three foremen of a special jury, one of the exceptions taken was, that the arbitrators had taken upon them to give a particular sum for costs, whereas they should have been left to the taxation of the master,

Lord Hardwicke, *Chief Justice*,—said, arbitrators who are judges to determine finally the differences between the parties, may, if they think fit, take upon them to inquire of and give costs, as well as damages; and this court has no power to take notice of it, any otherwise than, if they are excessive without any reason given for it, as an evidence of some undue practice.

Dudley v. Nettlefold, B. R. H. 13 G. 1. 2 Str. 737. Furnis v. Hallom, P. 22 G. 2. Barnes, 166. Perry v. Nicholson, T. 28 and 29 G. 2. B. R. Say. Rep. 240. Stephenson v. Browning, Barnes, 56.

If an award direct, in general terms, that the costs of the suit shall be paid, it is certain enough, because, in such case, the *quantum* of the costs to be paid may be ascertained by the officer of the court in which the suit was instituted, whose province it is to tax costs; namely, by the master in the King's Bench, and by the prothonotary, in the Common Pleas;—for, *certum est, quod certum reddi potest.*

Beale v. Beale, M. 10 Car. B. R. Cro. Car. 383. Hanson v. Liversedge, 2 Vent. 242. S. C. Carth. 156. Dub. cont.

So an award, that one of the parties should pay to the other the *charges in such a suit*, has been adjudged good; because the charges would be ascertained, when the attorney had delivered a bill thereof.

Winter v. Garlick, B. R. T. 3 Ann. 6 Mod. 195. S. C. Salk. 75. Vide 1 Sid. 12.

So it hath been determined, that an award, whereby one party is directed to pay the *charge of a suit then depending, of which the other party should deliver a bill*, is good enough, for it may be reduced to a certainty by the delivery of a bill. Linfield v. Ferne, P. 33 Car. 2. C.B. 3 Lev. 18.

But, where an award was to pay *all the expences of a suit, and all reasonable expences sustained circa sectam prædictam*, it was holden to be void for uncertainty. Bargrave v. Atkins, H. 6 W. 3. C. B. 3 Lev. 413.

And in a subsequent case, the Court resolved, that an award, by which the defendant was directed to pay to the plaintiff, or Mr. *William Cock*, his attorney, such costs as plaintiff was liable to pay, of an action in the Peverel court, and costs of an action at common law, between the plaintiff and the defendant and others, was uncertain, and not final, and, consequently, void. Furnis v. Hallom, P. 22 G. 2. Barnes, 166.

Where a submission to arbitration is under an order of *nisi prius*, the arbitrators have a power to award costs subsequent to the order; but where such submission is under a bond, the arbitrators cannot award costs subsequent to the bond. Carpenter v. Joynes, H. 5 G. 2. Pract. Reg. C. P. 45.

In *Tyne* v. *Every*, the arbitrators awarded costs of suit, and of the *reference* to be taxed by the prothonotary, but the Court, on motion, directed the costs to be taxed only down to the time of the reference. Tyne v. Every, P. 15 G. 2. Barnes, 58.

Arbitrators appointed under an order of *nisi prius* may, if they think proper, award the costs of the reference,

Bracher v. Cotton, H. 10 G. 2. Barnes, 123.

as well as the costs of the suit; but if they only award *costs* to be taxed generally, the costs of the reference ought not to be allowed on the taxation, but merely the costs of the suit.

NEITHER will an award that one party shall pay to the other the *costs by him sustained in the action*, include the costs of the reference.

Browne v. Marsden and others, C. B. P. 29 G. 3. H. Bl. 223.

As where, after issue joined in the cause, the parties submitted to arbitration; and the arbitrator awarded to the plaintiff 24*l.* damages, and the "costs by him sustained in "the said action, to be taxed by the proper officer."

THE prothonotary having refused to allow the costs of the reference, or any other, except those of the action, as between party and party; a motion was made for a rule to shew cause why he should not tax and allow the costs of the reference, together with the costs of the action, as between attorney and client.

BUT the Court—said, there was no precedent, for the costs of the reference to be included in an award of costs of the action; and having examined the award, the words of which were as above stated, held, that those words were confined to the costs of the action, and, therefore, refused the rule.

Barlow v. Flint, C. B. M. 12 G. 3. Say. Costs, 177.

IF a cause be referred to arbitration under an order of *nisi prius*, but a verdict be, nevertheless, taken for the plaintiff for a certain sum, as a security for what should be awarded

to be paid to him, and costs, the arbitrators cannot award a sum to be paid to the plaintiff *without costs*, because by the terms of the order they were precluded from entering at all into the question concerning costs.

If an arbitrator award *costs to be taxed by the master*, such costs shall be taxed as between party and party only, and not as between attorney and client.

Thus where all matters in difference were by rule of *nisi prius*, referred to arbitrators, who awarded, amongst other things, that the defendant should pay the plaintiff's attorney three full fourth parts of the costs, to be taxed by the master, the question was, whether the costs should be taxed as between attorney and client, or as between party and party? Pratt v. Salt, B. R. M. 9 G. 2. B. R. H. 161.

Lord Hardwicke, *Chief Justice*.—I see no reason or ground for taxing these costs as between attorney and client, for if the cause had gone on, and the plaintiff had had a judgment of the court, the costs must then have been taxed as between party and party; and why should it be otherwise where the parties have chosen their own judges, unless the arbitrators had expressly so awarded, as that the plaintiff should have all his expences, or such like expression, &c.

Cur. accord. and costs allowed as between party and party.

The latter part of Lord Hardwicke's opinion in the case of *Pratt* v. *Salt*, furnishes a strong inference that, if the arbitrators had either in terms directed the costs to be taxed

as between *attorney and client*, or even had used expressions indicating that such was their meaning, the costs ought to have been taxed in that manner; and, consequently, that the measure of costs, where a cause is referred to arbitration under a general order of *nisi prius*, is a matter resting solely in the discretion of the arbitrators. But, be that as it may, by subsequent determinations, upon this subject, it is established, that an arbitrator, appointed under an order of *nisi prius*, cannot allow any other than the common costs, as between party and party, unless the order, expressly, authorize him to allow what costs he may think proper.

Marder v. Cox, B. R. T. 14 G. 3: Cowp. 127. S. P. Durrant v. Kerr, H. 3 G. 2. Cas. Pr. C. P. 70.

THUS by an order of *nisi prius*, referring this case to arbitration, it was ordered, "that all matters in difference, be-"tween the parties, together with the costs of this action "and reference, be referred to the award of, &c." The arbitrator, as to the costs, awarded as follows:—"That the de-"fendant shall pay to the plaintiff his full costs and charges "of this action, such costs to be taxed as between *attorney* "and *client* by the proper officer, &c."

Dunning moved to set aside this award, because the arbitrator had exceeded his power in directing the costs to be paid as between attorney and client: for the intent of the reference was merely to put the party, who should be thought right, in the same situation as if he had had a verdict; in which case he could only have received costs taxed in the ordinary course between party and party.

UPON shewing cause, the Court held the award wrong

upon this objection; for the words of the reference clearly meant costs in a technical sense, which are *legal* costs: but as to *costs* they held it good; and, therefore, ordered, that so much of the award, as directed the master to tax the costs as between attorney and client, should be set aside, and the rest should stand.

So where there was a verdict for the plaintiff with 40*s.* damages, and 40*s.* costs, subject to the award of *J. H.* and if he awards more to be paid to the plaintiff, then judgment to be entered up for such sum, *together with the plaintiff's costs*, otherwise this verdict to stand. And it was further ordered, that the arbitrator might give such costs of the *reference* as he thought proper. The arbitrator made no alteration in the damages, but ordered the defendant to pay costs of suit, as between attorney and client, and also the costs of the reference as between attorney and client, "it being his "intent that the plaintiff should be reimbursed his full ex- "pences." Barker v. Tibson, C. B. T. 14 G. 3. 2 Bl. 953.

MOTION to set aside so much of the award, as orders *such* payment of costs.

Et per Curiam (*absente* DE GREY, *Chief Justice.*)—Here is no agreement or order of *nisi prius* to vary the general rule, that costs of suit on an award, shall only be the common costs. *Cooke*'s Cases, 69, 70. The arbitrator has indeed a discretion expressly given him to award what costs of the reference he thinks proper. Therefore rule absolute, for the prothonotary to tax the costs of the *suit only*, as between party and party.

Southmead v. Northmore, H. 5 G. 2. Cas. Pr. C. P. 69.

So it hath been holden, that an agreement in writing to pay *debt and costs*, generally, extends only to costs as between party and party.

Vide Lofft, 391.

WHERE a cause is referred by a rule of *nisi prius*, and the costs directed by the order, generally, to abide *the event*, that must be taken to mean *the legal event*; and, in such case, the costs are not left in the discretion of the arbitrator, but must follow the rule of law. So that, if, under such a rule of reference, an arbitrator award to the plaintiff damages below 40*s*. in a species of action in which he could not, upon a verdict below that sum, have had full costs, without a judge's certificate, the plaintiff cannot have more costs than the damages given to him by the award.

Swinglehurst, v. Altham and another, B. R. H. 29 G. 3. 3 T. R. 138.

THUS upon a motion, that the master should tax full costs upon an award for the plaintiff, in a cause which had been referred at *nisi prius*, it appeared, that this was an action of trespass for pulling down the plaintiff's gate, and that the declaration contained five counts, the fourth and last of which also included an assault upon the plaintiff. Justifications were pleaded to all but the fourth; and not guilty was pleaded to the whole. The defendants justified under an occupation way to *Tosside*-mill, on foot and on horseback, and with cattle and *carriages*; the like on horseback, and with cattle; the like on foot. They justified in a similar manner under other rights of way, none of which were found by the arbitrator as laid. And, as to the assault, the defendants pleaded, that at one of the times mentioned *molliter manus imposuerunt*, because the plaintiff stood in the way, and hindered the defendants from using it. The replication traversed all the rights of

way stated in the second, third, fifth, sixth, seventh, and eighth pleas, namely, all the horse and carriage ways; and with respect to the fourth and last pleas, the plaintiff new assigned as to the trespasses, but not as to the assault; and concluded that the defendants pulled down the gates, &c. on other occasions than in using the said footways. Issues were taken on the traverses, and not guilty pleaded to the new assignments. On the reference the *costs* were directed *to abide the event*. The arbitrator afterwards awarded an occupation way to the defendants over the plaintiff's *closes* [naming them] into a certain public highway situated within the parish of *Gisburne* in the county of *York*, and which said highway leads between *Bolton* and *Tosside* chapel in the said county, to pass on foot and on horseback, and with cattle, and no other right of way: and that inasmuch as one of the assaults committed by the defendants was when he was passing with *a cart* and horses, the arbitrator awarded *five shillings* to be paid by the defendants to the plaintiff for that injury.

Upon shewing cause against the rule, it was contended that the costs being to abide *the event* must be taken to mean the *legal event*: and that as the arbitrator had only awarded five shillings, the plaintiff was not entitled to any more costs than damages, in the same manner as if a verdict had been found for so much. In support of which were cited the two following cases from the master's note book. *Highnam* and another, executors, &c. v. *Hassel*, *Hil.* 14 *Geo.* 3. This cause was referred by order of *nisi prius*; and the costs were to abide *the event*, in the usual form. The arbitrators awarded that there was not any thing due from the defendant to the plaintiffs; in consequence of which the master taxed the defendant

his costs. Mr. *Buller* obtained a rule to shew cause why the defendant should not be restrained from proceeding to enforce the payment of costs taxed against the plaintiffs, they being *executors*. On shewing cause by *Wallace*, the rule was made absolute; and *per Curiam*:—The order of *nisi prius* is in the usual form; but the meaning of it is that the party should pay such costs as he would have been liable to pay in case a verdict had passed against him: and if a verdict had been given against the plaintiffs, or they had been nonsuited at the trial, they would not have been liable to pay costs, and therefore are not liable under this order. If they were, no executor would consent to a reference, as he would, in such case, be in a worse situation than if a verdict had been given against him. The other case was that of *Butler* v. *Grubb*, *Hil.* 23 *Geo.* 3. Mr. *Peckham* shewed cause against a rule for referring it to the master to tax the defendant his costs of the action. Mr. *Howarth* for the rule, stated, that this cause was referred to arbitration by rule of *nisi prius*, and the costs of the suit were to abide *the event*, &c. The arbitrators awarded that the plaintiff's original demand was under 40 *s.* *viz.* 37 *s.* and awarded the plaintiff the said 37 *s.*—and he contended that the plaintiff was not entitled to costs, any more than he would have been, if on a trial he had recovered under 40 *s.* but that on a suggestion, to be entered by leave of the court, the defendant would be entitled to costs; that the words in the rule, "costs to abide *the event*," mean the legal event; and of that opinion was the Court; whereupon the rule was made absolute. Mr. *Howarth* cited the above case of the 14 *Geo.* 3.

In support of the rule [in the principal case,] it was observed, that this was not a mere action for the assault, but

that the ground of it was to try a right of way; and, therefore, supposing the arbitrator to have been substituted in the room of the judge, he has in effect certified (*a*) that the assault was proved; but supposing he was not, he could not certify, and the reference should be considered like the execution of a writ of inquiry; in either of which cases the plaintiff would be entitled to full costs. On these pleadings none of the justifications are found for the defendants; a right of way is indeed found, but different from any of those pleaded; therefore it appears that the defendants assaulted the plaintiff at a time when the former were exercising a right of way, to which they were not entitled.

(*a*) 22 and 23 Car. 2. c. 9.

Ashurst, *Justice*.—(Lord Kenyon, *Chief Justice*, being absent.) The costs being to abide *the event* must be taken to mean the *legal event*, as appears by the cases cited. And we cannot say that the authority of the judge to certify was tranferred to the arbitrator. Then the damages awarded being under 40 *s*. the plaintiff cannot be entitled to any more costs than damages.

Buller, *Justice*.—The *event* of the suit must be taken to mean the *legal event*. The cases cited go clearly to shew that where the costs are directed to abide the event, they are not left in the discretion of the arbitrator, but must follow the rule of law. It appears strongly on the award that the assault found was committed in the closes of the plaintiff in asserting the way justified in the pleadings, and negatived by the arbitrator: but though we may think that was the fact, yet the way found must be intended to be the way

pleaded, and that goes to the assault justified; so do the footways confessed. The assault found then must refer to the fourth count, to which there is no justification. On this we must take it there has been a verdict for the plaintiff of five shillings damages. But we cannot consider this finding of the arbitrator as the certificate of a judge under the statute 22 and 23 *Car.* 2. Therefore the plaintiff is entitled to no more costs than damages.

GROSE, *Justice*, concurring, The rule was discharged.

SECT. VI.

Of Costs, where a Cause is made a Remanet, *or goes off by Consent at one Assizes, and is tried at a subsequent Assizes.*

Barnes, 150. 153. Cas. Pr. C. B. 138. 2 Wils. 366.

IT was, anciently, the practice in the Court of Common Pleas, never to allow the costs of attending an assizes, at which a cause was made a *remanet*, unless expressly agreed between the parties that such costs should abide the event of a trial of the cause.

Standen on the Dem. Wheatley v. Hall, B. R. P. 29 G. 2. Say. Rep. 272. S. C. cited marg. 4 Burr. 1988.

BUT on both the *crown* and *civil* side of the Court of King's Bench, it appears to have been always customary for the master, where a cause went off upon a *remanet* at one assizes, without any default whatsoever in either party, to allow the party, plaintiff or defendant, afterwards obtaining a verdict, the costs of both assizes.

AND it was holden by the Court of King's Bench, in a case where the cause went off *pro defectu juratorum*, that the costs of the attendance should be allowed to the party ultimately prevailing, as part of the costs of the suit.

Price, on Dem. Cuthbert v. Birt, B. R. T. 16 G. 2. Cited 4 Burr. 1988. marg.

AND now, for the sake of an uniformity of practice in this respect, whenever a cause goes down to trial, and is made a *remanet*, and tried at a subsequent assizes, the Court of Common Pleas, as well as that of the King's Bench, constantly allow the costs of both assizes.

Sparrow v. Turner, C. B. H. 7 G. 3, 2 Wils. 366. Vide 4 Burr. 1988. n.

IT was, formerly, holden that, when a cause had been twice carried down to trial, the party finally prevailing was not entitled to the costs of the former ineffectual going down to trial, unless the cause, at that time, went off as a *remanet*; but both the Courts of King's Bench and Common Pleas, have, of late years, thought fit to extend this allowance of the costs of a former going down to trial to other cases of the like kind with *remanets*. And the rule now is, that in all cases, where a cause goes down to trial, and goes off, upon *any* occasion, without the fault, contrivance, or management, of the parties, and is afterwards brought down again to trial, the costs of such former abortive going down to trial shall be taxed and allowed to the party finally prevailing, in the same manner as if the cause had gone off upon a *remanet*.

Burchall v. Bellamy, B. R. H. 11 G. 3. 5 Burr. 2692.

BUT though, where a cause goes off upon a *remanet*, the general rule is, that the costs thereby incurred shall attend the event of the cause, yet it was holden in the following case, that this general rule implies an exception of such particular

cases as are clearly distinguished, by their circumstances, from being within its reason and principle.

Sadler v. Evans, or Lady Windsor's Case, B. R. M. 7 G. 3. 4. Burr. 1984.

THIS cause was made a *remanet* at one assizes for want of time to try it, and at the subsequent assizes the plaintiff was nonsuited. A motion was now made that the master might review his taxation of costs, in which he had allowed the costs of the *remanet* with the other costs of the suit; and in the mean time proceedings to stay.

THE first objection which was made to the taxation was, that the plaintiff ought not to be obliged to pay these costs occasioned merely by the cause having stood over at the first assizes, as a *remanet*, without his fault.

LORD MANSFIELD seemed at first to think, that if neither side were in fault, neither side should pay costs. And this was made a *remanet* for want of time to try it.

BUT the Court and Master *Owen* agreed to the *general* rule, that costs are to be paid, where the cause goes off upon a *remanet*, as well as any other costs in the cause; and instanced in some *Maidstone* causes, which went off for want of viewers; so that neither party was in fault.

IT was then contended that, on the merits of this case, the master ought to review his taxation of costs upon the nonsuit.

LORD MANSFIELD,—on the merits of this question

(what costs ought here to have been allowed), I think that general rules imply an exception, in cases where the general rule is used for oppression, or where the hardship of the particular case is such, that it would be manifestly unreasonable and unjust to include it within the general rule; provided the application is made within due time. And if this had come recently before the Court, I should have thought that the plaintiff ought *not* to pay the costs of the *remanet*. For, it appears that the defendant treated the cause as likely to be of great length; though he intended to nonsuit the plaintiff, by an objection which he kept in reserve: and this put the plaintiff to a great expence. The defendant likewise pretended, that it was a great damage to him, that the action was brought against him, and not against Lady *Windsor*; when, in fact, Lady *Windsor* was the true defendant, and at the whole expence. So that it was a snare laid in order to prevent trying the right. Therefore, I should have inclined, upon a recent application, to have made this case an exception from the general rule; allowing the general rule to be right.

But the application is now made a year after a judgment, and after a writ of error brought by the plaintiff, and that writ of error *nonprossed*.

If a manifest miscomputation, or a plain mistake in figures, should appear on the face of the record, with regard to costs, I should think it might be amended: as, for instance, if the damages had been said to be 60*l.* and the costs 30*l.* which amount in the whole to 100*l.*

BUT here is no such manifest miscomputation or mistake on the face of the record. A proper distinction has been made between the damages given by the jury and the costs. And they certainly came too late: for *vigilantibus, et non dormientibus, jura subserviunt*. Every thing was in their knowledge, from the first moment: there is no new discovery, nor new ground. They should have complained during the taxation, or in due time afterwards; or else have shewn that it was not in their power to do so.

THE other judges concurred with Lord MANSFIELD, that this particular case was one of those, which ought to have been excepted out of the general rule, "that the costs of a *remanet* "ought to attend the event of the cause,"—if the application had come in time. But they were of opinion with his lordship, that, in the present case, the plaintiff had, by his own negligence, omitted the proper opportunity; and therefore, had now no title to relief, it being his own fault that he did not apply within due time.

Per Curiam, unanimously, Rule discharged.

CHAPTER VII.

OF THE COSTS OF A SPECIAL JURY, AND OF WITNESSES.

SECT. I.

Of Costs where there is a Special Jury.

IT was not usual, formerly, to grant special juries without the consent of the parties; however, in some instances, and for special causes, it was and might be done: and, in all cases, where a special jury was granted, whether with or without consent, the costs were always paid by the unsuccessful party. Before the Stat. 3 G. 2. c. 25.

BUT by the statute 3 *Geo.* 2. c. 25. s. 16. it was enacted, "That the person or party who shall apply for a special "jury, shall bear and pay the fees for the striking such jury, "and shall not have any allowance for the same, upon taxa- "tion of costs."

THE courts construed this clause to extend only to such fees and expences as were necessarily incurred by the actual striking of a special jury; and, therefore, held, that the extraordinary allowance to a special jury, and all other reasonable expences relative to, or occasioned by such jury, should Cas. Pr. C. B. 138. Barnes, 123. Pract. Reg. C. B. 248. Andr. 51. 53. 2 Str. 1080.

be taxed and allowed to the party obtaining a verdict, in the same manner as before this act.

As the expence of striking a special jury was, comparatively, very small and inconsiderable, such a jury was too often applied for in frivolous suits, with a view to harass and oppress the opposite party with the additional costs, rather than from any real apprehension of the difficulty or importance of the subject-matter of the suit. To obviate a practice so pregnant with injustice, the legislature were again obliged to interpose.

Persons applying for special juries to pay the expences of striking the same, and the charges occasioned by the trial, &c.

ACCORDINGLY, by 24 *Geo.* 2. c. 18. s. 1. it is enacted—"That the person or party who shall apply for a special "jury, shall not only bear and pay the fees for striking such "jury, but shall also pay and discharge all the expences occasioned by the trial of the cause by such special jury, and "shall not have any further or other allowance for the same, "upon taxation of costs, than such person or party would be "entitled unto in case the cause had been tried by a common jury; unless the judge, before whom the cause is "tried, shall immediately after the trial, certify, in open "court, under his hand, upon the back of the record, that "the same was a cause proper to be tried by a special jury."

Fees of jurymen.

And by the second section of the same statute it is enacted —"That no person who shall serve upon a special jury, shall "be allowed or take for serving on such jury more than the "sum of money which the judge, who tries the issue or "issues, shall think just and reasonable, not exceeding

"the sum of one pound one shilling, except in causes wherein "a view hath been or shall be directed."

SECT. II.

Of the Costs of Witnesses.

THE expences of a witness, who was *subpœnaed*, and actually attended at the trial of the cause, although he was never examined, ought to be allowed in the taxation of costs. Vide Doug. 438.

So ought the costs occasioned by the attendance of a material witness at the trial of the cause, if he were then examined, although such witness was not served with a *subpœna*; as likewise ought the costs of such witness *subpœnaed*, though he never attended. And it is said to be the practice of the Court of Common Pleas, to allow the costs of a material witness who attended at the trial of the cause, though he was neither *subpœnaed* nor examined; but that a different practice prevails, in this particular, in the Court of King's Bench, where no costs are allowed on account of any witness, however material he is sworn to have been, unless he was either *subpœnaed* or examined. Say. Costs, 183. 2 Cro. Pract. 462.

THE costs of a witness who attended the trial at the assizes were allowed, notwithstanding his testimony had been rejected by the judge at *nisi prius*, on the ground that he was not a material evidence, the plaintiff swearing that such witness was a material one, and his attorney, that such was the opinion of counsel. Senhouse v. Barnes, H. 7 G 2. Cas Pr. C. B. 98.

Hester v. Hall, M. 16 G. 2. Barnes 307.

If a plaintiff, after having given notice of trial, and countermanded the same within the time allowed by the practice of the court for that purpose, discontinue his action, upon the usual terms of paying costs, the defendant is not entitled, as part of those costs, to the expences of a witness who, between the time when the notice of trial was given, and when it was countermanded, set off to attend the assizes.

The contingent losses which witnesses may have sustained by obeying a *subpœna*, cannot be allowed in the taxation of costs

Thellusson v. Staples, B. R. T. 20 G. 3. Doug. 438.

Thus where two of the plaintiff's witnesses were foreigners, being the captain and first lieutenant of a ship, which was a *French* merchantman, and had been brought over to give evidence in the case of *Thellusson* v. *Fergusson*, had returned to *France*, and were again brought over for the trial of this cause. Upon the taxation of the plaintiff's costs, the master allowed the expences of the two witnesses in the journey and voyage going and coming, and during their stay in *England*; but the insured, for whom the plaintiff *Thellusson* was only an agent, and who was a merchant in *France*, stated to the Court, in an affidavit, that the two witnesses, when they were last in *France*, had been appointed supercargoes to two *French East-India* ships, and that they had lost their voyage by their attendance on this last trial; that before they left *France* they had made a protest against him, on account of any damages or loss they might sustain by coming to *England*, and that he believed that, on his return to *France*, he should be obliged to indemnify them. That as supercargoes they would

have been entitled to five pounds sterling *per cent.* on the produce of the outward and homeward-bound voyages, besides provisions, and other advantages. The master having refused to make any allowance on the above account, a motion was now made for a rule to shew cause why he should not review his taxation, and make an allowance adequate to what, by computation, the insured would, according to his affidavit, be liable to pay.

Lord Mansfield absent.

The Court refused the rule, and said, they could not allow for contingent damages; that it would be a dangerous precedent; and that the master had certified, that such applications had frequently been made, and always without success.

The costs of examining witnesses upon interrogatories, are always born by the party obtaining the rule for such examination, and do not abide the event of the cause, unless so ordered by the Court. Anon. B. R. P. 24 G. 3.

CHAPTER VIII.

OF STAYING PROCEEDINGS IN A SUIT,—TILL SECURITY GIVEN FOR THE COSTS;—TILL THE COSTS OF A FORMER ACTION FOR THE SAME CAUSE ARE PAID;—AND OF DEDUCTING THE COSTS OF ONE ACTION FROM THOSE OF ANOTHER.

SECT. I.

In what Cases, the Proceedings in a Suit will be stayed, till a responsible Plaintiff be named, or Security be found for the Payment of Costs, in case Judgment should be given against the Plaintiff.

SECT. II.

In what Cases, the Proceedings in a second Action will be stayed, till the Costs of a former Action are paid.

SECT. III.

In what Cases, the Costs of one Action shall be deducted from those of another.

SECT. I.

In what Cases, the Proceedings in a Suit will be stayed, till a responsible Plaintiff be named, or Security found for the Payment of Costs, in case Judgment should be given against the Plaintiff.

IT has long been the settled practice in both the Courts of King's Bench and Common Pleas, to make a rule upon motion, to stay proceedings in an action of ejectment, brought on the demise of an *infant*, until a real and responsible lessee be named, or security given for the payment of the costs, in case the plaintiff should be nonsuited, or the defendant obtain a verdict.

1 Str. 694. B. N. P. 111. B. R. H. 56. 2 Barnard. K. B. 140. 2 Kel. 65. 2 Str. 932. 1 Wils. 130. Barnes, 183. 189.

AND now, though the practice in this respect appears to have been formerly otherwise, the Court will make a similar rule, where the lessor of the plaintiff in an action of ejectment *is resident abroad*; accordingly, in a case, where an ejectment was brought upon the demise of a person who lived in *Ireland*, the Court of King's Bench stayed the proceedings until security should be given for the costs: although it was an ejectment brought under the direction of the Court of Chancery, where the bill was retained till after the trial of the ejectment, and security had been already given there for 40 *l.*

Vide 1 Barnard. K.B.197. Birchman v. Wright, B. N. P. 111. S. P. Cusach v. Jones, B. R. H. 33 G. 2. Say. Costs, 153. Barnes, 189. acc. Denn ex Dim. Lucas v. Fulford, B. R. T. 1 G. 3. 2 Burr. 1177. S.C. Say. Costs ubi supra.

So, if the lessor of the plaintiff in an action of ejectment

Goodright ex Dim. Larmer v. Searle, H. 28 G. 2.

Barnes, 147. S. P. Thrustout ex Dim. Turner v. Grey, B. R. M, 10 G. 2. 2 Str. 1056.

happen to die pending the suit, the Court will oblige the plaintiff to find security for the payment of costs.

Pike v. Corbin, B. R. H. 26 G. 2. Say. Rep. 78. S. P. agr. Aslin v. Parkin, B. N. P. 89.

And if, after a recovery in an ejectment, an action of trespass be instituted for the mesne profits of the premises, in the name of the nominal plaintiff in the ejectment, which it may be, the Court will, on application, make a rule for staying the proceedings in the suit, till a responsible plaintiff shall be nominated, or security given for answering the costs, to which the defendant may be eventually entitled.

But it should seem, that neither the King's Bench nor Common Pleas will make a rule for staying the proceedings in an action of ejectment till security shall be found for the costs, unless for one or other of the causes above enumerated. Therefore such a rule will not be made in an ejectment, merely, on account of the poverty of the lessor of the plaintiff; nor, because the lessor of the plaintiff, in a former ejectment brought for the same premises, in another court, (and which was abandoned) had been obliged to give security for the costs of that action.

Goodright ex Dim. Jones v. Thrustout, M. 4 G. 1. Cas. Pr. C. P. 15.

Doe ex Dim. Selby v. Alston, Bart. B. R. M. 27 G. 3. 1 T. R. 491.

As where the lessor of the plaintiff had brought an ejectment in the Court of Exchequer in the year 1784 to recover the possession of the same premises, for which the present action was brought, but had abandoned his suit when it came on to be tried.

A rule had been obtained, calling on the lessor of the plaintiff to shew cause, why the proceedings in this action

should not be stayed till he gave security for the costs, in case he was nonsuited, or a verdict was given against him. This rule was founded on an affidavit, which stated, that, in the former ejectment, the Court of Exchequer had obliged the lessor of the plaintiff to give security for the costs of that action.

BULLER, *Justice*.—This application is not warranted by any authority. The case in the Court of Exchequer does not apply here. There are only three instances in which the Court will interfere on behalf of a defendant, to oblige the plaintiff to give security for costs. The first is, when an infant sues, the Court will oblige the *procbein amy*, or guardian, or attorney, to give security for the costs: 2dly, When the plaintiff resides abroad, in which case the Court will stay the proceedings till security is given for the costs: and 3dly, Where there has been a former ejectment; but there the rule is to stay proceedings in the second ejectment, till the costs of the former are paid, and not till security is given for the costs of the second. So that even the form of the present application is wrong. But it is not stated, that the costs of the ejectment in the Court of Exchequer have not been paid. Rule discharged.

NEITHER will the Court order a lessor of the plaintiff, having privilege of parliament, to name a good plaintiff to be liable to costs.

Preston v. Lingen, B. R. M. 8 G. 1. 1 Str. 479. Vide 8 Mod. 21.

IT appears from *Doe ex Dim. Selby* v. *Alston*, that the Court of Exchequer will grant a rule requiring security for

costs in an ejectment in other cases than where the lessor of the plaintiff is an infant, resides abroad, or happens to die; for in shewing cause against the rule in that case the counsel stated, that the reason why the Court of Exchequer had compelled the lessor of the plaintiff to give security for the costs in the former action in that court was, because it was stated to them that he could not be found.

Vide etiam Right ex Dim. Cuzach v. Wrong, Burt. Pr. Exch. 205.

It was held by the Court of King's Bench in a variety of cases, and those of no very ancient date, that a plaintiff's residence abroad, or in *Scotland*, was not a sufficient ground for staying the proceedings in the suit till security was given for the costs, because such a practice, it was said, might operate as a discouragement of trade and commerce, would be clogging the course of justice, and, in a great measure, preclude foreigners from suing in our courts, as in a strange country, they might, frequently, be unable to find security.

a Str. 1206. 1 Wils. 266. 2 Burr. 1026. 4 Burr. 2105. Cowp. 158.

However, of late years, this matter has been viewed in a different light; and this court has, in several cases, where the plaintiff was resident abroad, stayed the proceedings in a cause till security was found for the costs; and for this reason, that if a verdict be given against the plaintiff he is not within the reach of our law, so as to have process served upon him for the costs.

Pray and others v Edie, B.R.P. 26G.3. 1 T.R. 267. 491.

And, in a subsequent case, the Court made absolute a rule for staying the proceedings till the plaintiff, who was an *Irishman*, and resided at *Waterford* in *Ireland*, gave security for

Fitzgerald v. Whitmore, B. R. T. 26 G. 3. 1 T. R. 362.

the costs, in case a verdict was given against him, or he was nonsuited.

In shewing cause against this rule, it was observed, that the reason why such a practice had lately been adopted, contrary to the former determinations, in the case of foreigners, was, because *English* subjects, who sued in most of the foreign countries in *Europe*, were under a similar necessity of giving security for costs. And that it would be impolitic to extend this rule to *Ireland*.

But the Court were of opinion, that the same reason which had induced them to lay down the rule with respect to foreigners, namely, because the process of our courts would not reach them in case an execution issued for the costs, held equally with respect to *Irishmen*.

Upon this point the Courts of King's Bench and Common Pleas have adopted different rules of practice; from the above authorities it appears, that the former court will compel a plaintiff to find security for costs upon the single ground of his being resident abroad, beyond the reach of the process of the court, provided the defendant *have put in bail*, (for previous to his doing so, even that court will not now interfere,) but the Common Pleas will not exact such security merely because a plaintiff is in a foreign country, without other concurring reasons.

De la Preuve v. the Duc de Biron, B. R. P. 32 G. 3. 4 T. R. 697.

Therefore, upon a motion to stay proceedings till the plaintiff, who was abroad, gave security to pay the costs, in

Parquot v. Eling, C. B. H. 29 G. 3. H. Bl. 106.

case a verdict should be found against him, the Court of Common Pleas would not grant a rule, on the circumstance alone, of his being resident abroad, but required an affidavit of—" his having gone thither to avoid payment of his debts, " —of his insolvency in a foreign country,"—or the like, saying, that the practice was now settled in this court, that the plaintiff should not be compelled to give such security, merely because he was in another country.

An affidavit of this sort being produced, on a subsequent day, a rule was granted to shew cause, which no cause being shewn, was, afterwards, made absolute.

Porrier v. Carter, C. B. H. 29 G. 3. Ibid. ubi supra.

But the Court will not stay proceedings till the plaintiff gives security for costs either on the ground of his being a foreigner, or insolvent, if he *reside* in *England*.

Before the practice of staying proceedings, on account of a plaintiff's residing abroad, till security given for costs, became general in the King's Bench, that court would have interfered in the behalf of a defendant in a *qui tam* action, to oblige the plaintiff, if he resided abroad, to find such security.

B.R.P. 12 G. 1. 1 Str. 697. 1 Wils. 266. adm.

Accordingly, this was done in *Vat, qui tam,* v. *Green,* the plaintiff being in that case resident in *Switzerland*.

Real v. Macky, B.R.P. 17 G. 2. 2 Str. 1206.

And the language of one case seems to afford an inference, that the Court will require security for costs in a *qui tam* action, where the plaintiff is a *foreigner,* though resident in *England*. *Sed quære.*

So it is said that, if a prosecution upon a penal statute be brought in a feigned name, the Court will oblige the real prosecutor to give security.

Shindler v. Roberts, C. B. P. 12 G. 2. B. N. P. 197.

But the Court will not insist upon such security in an action upon a popular statute, merely on account of the *poverty* of the plaintiff, for the statute having given him a power to sue, it is a debt due to him.

2 Bulstr. 18. Shindler v. Roberts, B. N. P. ubi sup. S. C. Barnes, 126. Pract. Reg. C.P.126. VideCowp.24.

SECT. II.

In what Cases, the Proceedings in a second Action will be stayed, till the Costs of a former Action are paid.

In general, the courts will grant a rule to stay proceedings in a second action of ejectment till the costs of a former ejectment for the same premises have been paid.

1 T. R. 492. 1 Ld. Raym. 697.

And they will grant such a rule in ejectments, not only where the merits were decided in the former action, but also where there was a judgment of nonsuit, or of *nonpros*, against the plaintiff in that action.

4 Mod. 379. Salk. 255. Pendock v. Johnson, Pract. Reg. C. P. 174. Comb. 110. acc.

So where Lord *Coningsby* brought an ejectment, and obtained a rule for a trial at bar, but, it afterwards appearing to be upon a wrong demise, he delivered new ejectments, and applied a second time for a trial at bar; which the Court refused to grant, except on condition of his paying the costs occasioned by the former ejectments.

Lord Coningsby's Case, B. R. H. 9 G. 1. 1 Str. 548.

Short v. King, B.R.H.12G.1. 2 Str. 681.

HOWEVER, in a subsequent case, where it appeared that the plaintiff had declared in ejectment upon a single demise, and, afterwards, finding it necessary to add another demise by trustees, had delivered a new ejectment upon the double demise, the Court rejected a motion to stay proceedings in the latter ejectment until the costs of the former were paid, saying, that it was never granted unless it appeared the party had been vexatious, or had run the defendant to a great expence, which was Lord *Coningsby*'s case, who came for a trial at bar in the new ejectment, after the former cause was ready for the bar, in granting which, being a matter of favour, the Court might make their own terms.

IT was holden, in one case, that the proceedings in a second ejectment ought not to be stayed till the costs of a former one were paid, if, in such former action, no costs were payable by the plaintiff.

Thrustout ex Dim. Parke v. Troublesome, B.R.M.12G.2. 2 Str. 1099.

THUS, where the lessors of the plaintiff delivered three ejectments in the Common Pleas, and two in the King's Bench for the same tenements, and made the defendants attend at five assizes, but had countermanded all the notices of trial in time enough to save costs, the Court, notwithstanding the vexatiousness of such a course of proceeding, refused to grant a rule to stay the proceedings in the last ejectment till the costs of all the former were paid, because no costs were demandable by the rules of the Court, the notices of trial being countermanded within due time. But, on a subsequent day, the Court made a rule to stay the last ejectment, till the plaintiff had discontinued the former.

6 Vin. Abr. 342. pl. 19. Andr. 297.

A RULE, however, similar to that refused in the last case, has been since granted, notwithstanding the lessor of the plaintiff was not liable to the payment of any costs in the former ejectment, it appearing that the second ejectment was vexatious and oppressive.

THUS, on a motion to stay proceedings in this ejectment, till the costs of two former ejectments brought on the same title were paid, it was alleged, that in those, upon the tenant's entering into the common rule, the lessor of the plaintiff had neglected to enter into the consent-rule, and no further proceedings were had: which was extremely vexatious and oppressive to the tenant in possession, as there was nobody of whom he could recover his costs.

Smith ex Dim. Ginger v. Barnadiston, C. B. P. 13 G. 3. 2 Bl. 904.

2 Bl. 763.

IT was shewn for cause, that this was a new attempt, as no costs were payable till the lessor of the plaintiff joins in the consent-rule. And, being new, the Court took from last term to this to consider of it. And now,

Per DE GREY, *Chief Justice*, and the whole Court.—We think this application very just and reasonable. It is said, that a lessor of the plaintiff is not made answerable for costs by the tenant, or a new defendant's, entering into the common rule; till he himself joins in the consent-rule by signing it, and thereby making his option to proceed against the new defendant. This, whether reasonable or not, has given rise to the present doubt. But we think (and it is not our opinion only, but that of other judges) that, whatever foundation there may be for the practice alluded to, yet when the

Court sees manifest vexation and oppression, as in the present case, it will exercise it's jurisdiction over this fictitious proceeding to prevent it. Rule made absolute.

THE Court will stay the proceedings in an action of ejectment till the costs of a former ejectment between the same parties are paid, the very day before the trial, under particular circumstances and on shewing a satisfactory reason why the application was not made at an earlier stage of the suit.

Doe ex Dim. Chadwick v. Law, C. B. T. 17 G. 3. 2 Bl. 1158.

AS where a former ejectment had been brought in the King's Bench, between the same parties, wherein the defendant in *Hilary* Term, 13 *Geo.* 3. obtained a rule for costs for not proceeding to trial, which were taxed at 85 *l.* 8 *d.* after which the cause was tried in the same term by a special jury, and a verdict was found for the defendant; and his costs were taxed on the *postea* on the 11th of *June*, 1777, at 273 *l.* 10 *s.* Total 358 *l.* 10 *s.* 8 *d.* no part of which was paid.

A MOTION was now made that the proceedings in this cause should be stayed till the costs of the former were paid.

FOR the plaintiff it was urged, that this application came too late. The declaration was delivered before the *Essoign* day of last *Easter* Term. Notice of trial given for the sittings after this term, *viz.* the 19th of *June*. The plaintiff has been at the expence of preparing for trial, and bringing his witnesses to town; and this motion was not made till *Friday* the 13th of *June*.

In support of the rule, it was alleged, that the cause was so clear at the last trial, and the parties had rested so long, that they did not think them in earnest, till notice of trial was given. The defendant then proceeded to tax his costs, in order to ground this application, which otherwise he would not have done, the lessor of the plaintiff being insolvent.

The Court, on considering all the circumstances, made the rule absolute.

The practice of staying the proceedings in an ejectment till the costs of a former ejectment between the same parties were paid, was, for some time after it's introduction, restrained to cases, where the first ejectment was brought in the *same* court as the second; however, it is no longer material in what court the former ejectment was brought, since the courts of *Westminster-Hall* now pay the same respect one to another, and consider a former ejectment in another court as they do a former ejectment in the same court, and, consequently, will grant a rule to stay a second ejectment till the costs of a former one are paid, as well where such second ejectment is brought in a different, as where it is brought in the same, court, as the former.

1 Sid. 279. Comb. 106.

Anon. B. R. H. 10 W. 3. Salk. 255. Holdfast ex Dim. Hattersley v. Jackson, T. 17 and 18 G. 2. Barnes, 133. It is said in Barnes, that the same practice also prevails in the Court of Exchequer.

It has been resolved, if an ejectment be brought upon the demise of husband and wife, in which judgment is given for the defendant, and afterwards a new ejectment brought on the demise of the wife alone, that the proceedings in the latter ejectment shall be stayed till payment of the costs of the former.

Doe ex Dim. Duchess of Hamilton v. Hatherley, B. R, P. 14 G. 2. 2 Str. 1152.

THUS, after judgment for the defendants in an ejectment brought upon the demise of husband and wife, a new ejectment was brought on the single demise of the wife against some of the same persons, who were defendants in the former ejectment. And, upon application to stay her proceedings till the costs of the first ejectment were paid, it was insisted, that the former action was on the demise of both husband and wife, and the rule was in the singular number, *quod demissor querentis sit onerabilis.*

Sed per Curiam,—We are not going to order the present lessor of the plaintiff to pay costs, but only preventing her being vexatious; which in 4 *Mod.* 379, is said to be the foundation of these rules. Besides, in this case, she proceeded after the death of her husband, and, therefore, let the rule be to stay proceedings in this cause, till the costs of the other are paid.

AND although the lessors of the plaintiff in the two ejectments be totally different persons, yet, if the proceedings in the second appear to be *fraudulent*, and calculated to evade the payment of the costs of the first, the Court will not permit the second ejectment to proceed till the costs of the former have been paid.

Doe ex Dim. Chambers v. Law, C. B. H. 18 G. 3. 2 Bl. 1180. Vide ante.

THIS was an ejectment brought for the recovery of the same premises as that of *Doe ex Dim. Chadwick* v. *Law*, *T.* 17 *Geo.* 3, in which, as hath been already stated, a rule was granted to stay proceedings till 358*l.* 10*s.* 8*d.* the amount of former costs, should be paid. Since which rule an

assignment of all *Chadwick*'s estate contained in his schedule delivered in *July*, 1774, was made under the *insolvent* debtor's act to *Chambers*, the now lessor of the plaintiff, who in the last term brought this ejectment.

MOTION to stay these proceedings till the costs of the former ejectment were paid, and till the lessor of the plaintiff makes election, whether to proceed in this or the former cause, and that he should pay the costs of this application, the assignment being merely fraudulent, and for the purpose of vexation.

GOULD, *Justice*.—I give no opinion, whether in a fair case the assignee of an insolvent debtor shall be called upon for former costs before he is suffered to try a new ejectment on the title of his principal. But this is a mere contrivance to defraud the defendant. The first ejectment was brought in the King's Bench in 1773, which failed. In *July*, 1774, *Chadwick* took the benefit of the insolvent act, and delivered in his schedule. In *Easter* Term, 1777, a new ejectment is brought in this court, which was stayed till the payment of the former costs. To evade this rule, and for no other purpose, a subsequent assignment is made to *Chambers*. This is too gross to be endured.

BLACKSTONE and NARES, *Justices*, concurred. DE GREY, *Chief Justice*, absent.

RULE absolute, to stay proceedings until, &c. and that *Chambers* should pay the costs of the application.

THERE has been a diversity of opinion, whether or not a second ejectment shall be stayed until the payment of the costs of a former ejectment for the same lands, where the two ejectments are brought (without fraud or collusion,) upon different demises, but upon the same title.

THIS point was agitated in two cases in *Comberbach*; the first of which was a motion to stay the trial of an ejectment at bar, till the payment of costs of a former trial in ejectment in the Common Pleas. The actions were not between the same persons, there being a different lessor of the plaintiff in the second. DOLBEN, *J.* was of opinion, that, forasmuch as it appeared in this case to be on the same title, it was reasonable to grant the motion. HOLT, *Ch. J.* said, they could not take notice that it was on the same title; but admitting it was so, yet there was another person, (*viz.* an heir or a devisee) who was not liable to pay the costs of the former action. But the matter was adjourned.

Tredway v. Harbert, B. R. P. 1 W. and M. Comb. 106.

ON a subsequent day in the same term the same question occurred, when it went off, a second time, without a decision, the Court being equally divided upon it.

Dence v. Doble, B. R. P. 1 W. and M. Ibid. 110.

IN a modern case, however, the Court of King's Bench granted a rule to shew cause, why the proceedings in an ejectment should not be stayed until the payment of the costs of a nonsuit in a former ejectment, which had been brought for the same premises twelve years before, upon an affidavit, stating, that the lessor of the plaintiff in the latter ejectment, claimed under the person who was lessor of the plaintiff in the former.

Doe v. Law, B. R. H. 25 G. 3.

THE Court will not grant a rule to stay proceedings in a second ejectment till the costs of a former ejectment, between the same parties, and for the same lands, are paid, if it appear that one of the lessors of the plaintiff is in custody upon an attachment for non-payment of those costs; for, in such case, there is no reason for granting the rule, because the lessor of the plaintiff, being in custody under an attachment, which is in the nature of a *capias ad satisfaciendum*, is in effect in execution.

Benn ex Dim. Mortimer v. Denn, T. 13 G. 2. Pract. Reg. C. B. 175. S. C. Barnes, 180.

So where, after a verdict for the plaintiff in an action of ejectment, the defendant in that action brings a new ejectment against the same plaintiff for the same premises, the Court will not stay the proceedings in the latter action until the costs of the former have been paid.

Roberts v. Cook, B. R. H. 6 W. and M. 4 Mod. 379.

IF the defendant, after bringing a writ of error upon a judgment against him in an action of ejectment, deliver a new declaration in ejectment for the same premises, the Court will not compel him to pay the costs of the first ejectment, before he proceeds, but they will stay the second ejectment till the writ of error is determined.

Anon. H. 2 Ann. B. R. cited Salk. 259.

BUT if, after a verdict for the defendant in an action of ejectment and costs taxed, the plaintiff bring a writ of error, and, pending it, a new ejectment,—the proceedings in the second ejectment shall be stayed until the costs of the former are paid, unless the plaintiff can satisfy the Court, that the writ of error was brought with some other view than to keep off the payment of costs.

Grumble v. Bodilly, B. R. T. 9 G. 1. 1 Str. 554. S. C. 8 Mod. 225.

From the cases which have been cited in the preceding part of this section, it appears that the practice of granting a rule to stay the proceedings in a second action till the costs of a former action, between the same parties, for the same cause, are paid, has uniformly prevailed in ejectments; the reason whereof is, that the action of ejectment being a fictitious form of proceeding, invented under the control and power of the courts, they have an indisputable right to interfere at any stage of the suit, and in such a manner as may prevent vexation, and best answer the ends of substantial justice. But whether the courts possessed a general power of granting such a rule in all other species of actions as well as that of ejectment, was long a matter of doubt and controversy. And the determinations upon this question, particularly the more ancient ones, can, perhaps, scarcely be reconciled. But, whatever doubts might once be entertained upon the subject, the courts have often, of late, very equitably exercised the power of staying a second action till the costs of a former, for the same cause, were paid, in other cases besides those of ejectments. And it may be now laid down as an established proposition, that no kind of action shall be permitted to proceed till the payment of the costs of a former action (although in a different court) for the same cause, and wherein the merits were fully heard and decided. Indeed the Court of King's Bench has gone further than that of the Common Pleas in this respect, for it has sometimes granted the rule of which we are treating, although the merits were *not* tried in the former action. I shall now proceed to state the cases in which this point has been agitated.

UPON a motion that the plaintiff might be compelled to pay the costs of a former action before he was suffered to proceed in this, it was shewn to the Court, that he had had theretofore a trial at bar for the same thing for which the present action was brought, which trial then went against him, that he had not paid the defendant the costs, and had now brought a new action. Rule absolute.

Hacker v. Newburn, B. R. H. 1653. Style, 413.

LORD BYRON having been nonsuited in one action, commenced another for the same cause, and refused to pay the costs taxed against him upon the former nonsuit. It was alleged that this second action was brought merely for vexation, as he could not be compelled to pay the costs of the former, being a peer, and the parliament sitting.

Lord Byron's case, B. R. M. 22 Car. 2. 1 Vent. 100.

WHEREFORE the Court gave a day to shew cause, why this action should not stay until he had paid the costs in the former.

IT does not, however, appear that this rule was ever made absolute.

AGAIN, in an action of debt upon a bond made by a foreigner, and conditioned for the payment of a certain sum of *West-Jersey* money, the plaintiff declared for the like sum of the money of *England*, and was, for this variance, nonsuited by HOLT, *Chief Justice*, at the trial. The plaintiff, afterwards, brought a new action upon this bond in the *detinet* as a foreign coin *ad valorem* of so much of *English* money; upon which it was moved, that the plaintiff might

Bass v. Firmen, B. R. M. 13 W. 3. 1 Ld. Raym. 697.

not proceed, before he had paid the costs of the former nonsuit. But the Court *rejected* the motion, because the merits did not come in question at the trial of the first action, the nonsuit being occasioned by a variance. And they added, that the rule applied for was grantable generally only in ejectment.

Anon. B. R. M. 8 Ann. 2 Ld. Raym. 1308.

BUT in another case it is stated that, the plaintiff having been before nonsuited in one action, the Court *granted a* motion to stay the proceedings in a second action for the same cause, till the costs of the first nonsuit were paid.

Knock v. Wilkins, B. R. P. 5 G. 2. 2 Kel. 62. S. P. Chapman v. Brown, B. R. M. 7 G. 2. Ibid. 163.

AFTER the taxation, but before the payment of costs for not proceeding to trial, in an action of assault and battery, the plaintiff brought a fresh action, upon which a motion was made, that all proceedings might be stayed till the costs of the first action were paid. *Sed per Curiam*—You may have an attachment for the contempt, but we never stop proceedings in these cases, except in ejectment.

Lazarus v. Pritchard, H. 11 G. 2. Barnes, 125.

IN *Lazarus* v. *Pritchard*, which was an action of trover, the Court discharged a rule to shew cause why proceedings should not be stayed till after payment of costs, allowed to the defendant in a former action for the same thing, as unprecedented; such rule never being granted in any case, except ejectment.

Real v. Macky, B. R. P. 17 G. 2. 2 Str. 1206.

IN conformity to these cases, in *Real* v. *Macky* it is laid down by the Court, that although they do make a rule for staying a second action of ejectment till the costs of a former

action are paid, because the cases in ejectment are more under their power than other proceedings, yet they cannot make such rule in other cases.

So upon a motion, that the proceedings in this case, which was an action upon the statute of usury, might be stayed until the costs taxed on a *nonpros* in the cause wherein *Samuel Chadwick* was plaintiff, and the said *William Cox* defendant, were paid.

English, *qui tam*, v. Cox, B.R.T. 15G.3. Cowp. 322.

Aston, *Justice*, said, though the Court may, perhaps, in some cases, have been off their guard, and granted a motion of this kind, it has always been refused, on consideration; and the reason is, that the party is at liberty, if he pleases, to pursue the costs of the former action. Motion refused.

By several subsequent cases, however, the power of the courts to grant this rule, not only in the action of ejectment, but also in every other species of action, where the justice and equity of the case requires it, is fully established. And, in the two following cases, it was solemnly adjudged by the Court of Common Pleas, that, wherever a second action, of what nature or kind soever, appears to be, evidently, vexatious, as if it be brought after a former action, on the same account, in which the merits were fully tried,—proceedings therein shall be stayed till the costs of such former action are paid.

Thus, upon a rule to shew cause why the proceedings in an action of *assumpsit* should not be stayed until the costs in an action of trover were paid, the circumstances were, that,

Gravenor v. Cape, C. B. P. 9 G. 3. Say. Costs, 245. S. C. cited 3 Wils. 150. 2 Bl. 741.

after the issuing of a commission of bankruptcy against the plaintiff, he had petitioned that the commission might be superseded, or that an issue might be ordered, to try whether the debt of the petitioning creditor amounted to one hundred pounds; that the petition was, upon reading the affidavits, and hearing counsel on both sides, dismissed by the Lord Chancellor; that the plaintiff, afterwards, brought an action of trover, against the present defendants, for the conversion of goods assigned to them under the commission; that a verdict was found for the defendants in that action, and that verdict, which was found in *Hilary* Term, 1768, acquiesced in; and that, after the collection and division of the plaintiff's effects by the defendants, the present action was brought for money had and received by them to the use of the plaintiff.

WILMOT, *Chief Justice*.—It has not been usual for the Court to make a rule to stay the proceedings in a second action, until the costs of a former action shall be paid, unless in an action of ejectment. But, upon the particular circumstances of a case, the Court may make such a rule in any other action; and we are of opinion that the present is a proper case to make such rule in. It has been said, that the plaintiff can now prove something, which was not proved in the action of trover, and which will reduce the debt of the petitioning creditor to a sum below one hundred pounds; but, as the *quantum* of the petitioning creditor's debt was decided upon by Lord *Camden*, and must have been proved in the action of trover, the present action is quite vexatious. It might, moreover, be of dangerous consequence, to give the plaintiff a chance of making void all the proceedings under

the commission, which have been so long acquiesced in. One of the reasons for making such a rule as is now applied for, in a second action of ejectment, is, that one recovery in ejectment cannot be pleaded in bar to another ejectment for the same lands; now that reason holds equally in the present case, inasmuch as the verdict in the action of trover cannot be pleaded in bar of the present action.

Per Curiam.—Rule absolute.

Melchart and others, v. the executors of Halsey, C. B. H. 11 G. 3. 2 Bl. 741. S.C. 3 Wils. 149.

AGAIN, this was a motion to stay the proceedings in an action upon the case upon promises for 10,000 *l.* till the plaintiffs should pay the costs of a nonsuit, on the same cause of action, in a suit brought in the King's Bench. The plaintiffs were foreigners, and the action was founded upon a contract made between the plaintiffs and the testator of the defendants, for forage found and provided by the plaintiffs, for the *British* troops in *Germany*, in the late war, at the instance and request of the said testator. No claim was made by the plaintiffs, till after the commission for liquidating such demands, was closed, and then they brought their action against the defendants, supposing *Halsey*, their testator, to be personally liable, in his own right. This action was tried before Lord MANSFIELD, at the sittings after last *Easter* Term, when his lordship, being of opinion (upon the evidence then given,) that the contract was made upon public faith and the credit of the government, and not upon the credit of the defendants' testator, the plaintiffs were nonsuited upon the merits, but had leave to move for a new trial.

ACCORDINGLY, in *Trinity* Term last, a motion was made for a new trial, which was, on solemn argument, rejected by the whole Court of King's Bench. And the plaintiffs now brought this action here against the defendants, and declared upon the same contract.

IN support of the motion the cases of Lord *Byron*, *Bass* v. *Firmen*, and *Gravenor* v. *Cape*, were relied on; and a case of *Carr* and *Sharp*, *Trin.* 9 *G.* 3. *B. R.* was cited; which was a motion to stay proceedings, till costs, for not proceeding to trial in a former action upon the same subject, were paid; and that the plaintiff, who lived in *Jamaica*, might give security for the costs in the present action. ASTON, *Justice*, thought, such a rule could not be granted, except in ejectment. But YATES, *Justice*, mentioned *Smyth* and *Lydcott*, 1 *Geo.* 3. where that point had been litigated, and the Court said, it was reasonable the same rule should obtain in actions upon the case, as well as in ejectments. A rule was granted to shew cause, on the first part of the motion; but rejected, as to the security for the future costs. On shewing cause, it appeared, that no declaration had been delivered, and, therefore, *non constat* whether the cause of action was, or was not the same. The rule discharged.

AGAINST the motion, in the principal case, *Lazarus* v. *Pritchard*, and *Real* v. *Macky*, were cited.

THE Court took a few days to consider the cases; and then, by

De Grey, *Chief Justice*.—If the Court can do what is now prayed by the defendant, no doubt it ought to be done. Before the plaintiff proceeds here, he ought to pay the expences arising from his false claim in the Court of King's Bench, where the matter was fully heard and determined against him.

In some instances, the Court has never scrupled to do it; particularly in the case of ejectments. But it is said, they are more in the discretion of the Court. True, these being fictitious proceedings, the Court will so modify and correct them, that justice shall be effectually done. But if it is justice there, it is also justice in other cases.

But it is not only in ejectments, that the Court has shewn its readiness to apply this remedy, if the case would bear it. Lord *Byron*'s case, *Bass* and *Firmen*, and others that have been mentioned, were of this kind. The motions miscarried, not because improper in general, for then there would have been no rule to shew cause; but because, upon examination of the circumstances, they did not turn out to be proper cases.

But, in *Gravenor* v. *Cape*, the Court was well satisfied, that the second action was vexatious; and, therefore, made the rule absolute in that case.

As many circumstances concur in this case, as in that, to shew the plaintiff ought to be satisfied with the determination of the former action. Wherefore I think the rule should

be made absolute. And though I do not ground my opinion upon the plaintiffs being foreigners, yet the circumstance of their being foreigners, makes this second action more vexatious, because there is no security or remedy for costs.

GOULD, *Justice*, of the same opinion.

THE true ground of the present rule is, that the second action is vexatious.

THE principles of the common law warrant even a security for costs. The *plegii de prosequendo* arose from the law's jealousy of the plaintiff. And in *Henry* the Third's time, the legislature provided for costs by the statute of *Marlbridge*. Lord *Coke* in his comment thereon, 2 *Inst.* 112. says, "there is no greater injustice, than when under colour "of justice injury is done." That *multi litigant in foro non ut aliquid lucrentur, sed ut vexent alios, &c.* Although the Court will not oblige a foreigner to give security for costs, yet when he has had the merits tried and determined against him, and will not do justice by paying the costs, he becomes vexatious by bringing a second action to try the same matter; and for that reason alone, I think the rule ought to be made absolute: the circumstance of the plaintiffs being foreigners, I put quite out of the case.

BLACKSTONE, *Justice*, of the same opinion.

I LAY the circumstance, of the plaintiffs being foreigners, entirely out of the case. The king's courts should

be as open to them as to natives; and no discouragement should be given to them, when suing for a fair and just debt. Such a practice would ruin the national credit abroad, which is of the utmost importance to a trading country. Our merchants obtain the more extensive credit, from the opinion which foreigners entertain, of the justice of the *English* courts.

BUT, I think, that in all cases, where the merits have been fully heard and determined, it would be a good rule, that it should not be re-heard in another action till the costs of the former were paid. The present action seems to be indeed vexatious; but if the plaintiff is dissatisfied with the former determination, he has a right to take the opinion of another court. But then he should pay all *former* costs, and set the defendant, as near as possible, in the same plight, as if no former litigation had been had.

NARES, *Justice*, of the same opinion, and cited Lord *Raym.* 865, *Elwes* v. *Mocata*; where the Court hesitated, whether even an administratrix should not pay costs of a former action, on bringing a new *assumpsit*. Rule absolute.

THE Court of King's Bench have also granted this rule in several other cases than ejectments; and they will do this although the merits have not been already tried, if the second action appear to be vexatious, or there be some other circumstances of hardship attending the case.

THUS, it was moved that proceedings in the present action might be stayed till the costs (129*l.*) taxed in a for- Moulton, *qui tam*, v. Bingham, B. R.

H. 17 G. 3. 2 T. R. 511. n. (a)

mer action on the statute of bribery, between the same parties, in which action the plaintiff was nonsuited, should be paid. The plaintiff's attorney would neither pay the costs, nor discover the plaintiff's place of residence. Cause was shewn on an affidavit, which denied that the plaintiff's attorney refused to pay the costs, and saying he was ready to pay the same.

Per Curiam.—Upon payment of the costs taxed on the nonsuit, within a week, let the rule be discharged; in default thereof, let it be made absolute.

Baldwyn v. Richards, B. R. H. 19 G. 3. Ibid.

THIS was a rule to shew cause why the proceedings in this action, which was for a malicious prosecution, should not be stayed till the plaintiff had paid the costs taxed on a judgment as in the case of a nonsuit, and the costs taxed on the rule to shew cause why judgment as in case of a nonsuit should not be entered for not going on to trial, in a former action for the same cause.

IT was admitted by the counsel for the rule, that such motions had generally been denied; but he said that the plaintiff in this case had brought a writ of error to the judgment which had been non-prossed, which shewed vexation.

LORD MANSFIELD,—said, that, if the plaintiff had paid the costs on the rule being served, the defendant should have paid the costs of this application; and asked, whether the party was ready to pay the costs now? To which no answer being returned, the Court made the rule absolute.

AGAIN, the plaintiff, having been nonsuited in a former action of trespass against the defendant, for taking his goods as a distress for rent, brought this second action for the same cause, and sued *in formâ pauperis*, being a prisoner in the King's Bench. The costs of the former action amounted to 32*l.* which the defendant swore he could not levy, the plaintiff not having any goods. Weston v. Withers, B. R. P. 28 G. 3. 2 T. R. 511.

UNDER these circumstances, the Court made a rule to stay the proceedings in the second action until the costs of the former were paid.

BUT the Court of Common Pleas will not grant a rule to stay proceedings in a second action till the payment of the costs of a former action, on the same account, unless the merits were decided in the first action, however vexatious the second may be.

As where, upon a motion to discharge the defendant, on a common appearance; and that proceedings might stay, till the plaintiff had paid the costs of two former actions, it appeared, that the plaintiff and defendant had some large dealings about shipping, at *Bristol* and *Bridgewater* in *May*, 1768; in consequence of which *Chubb* the now defendant, brought an action in this court against *Cox* the plaintiff, recovered judgment, and charged him in execution for 172*l.* *Cox* filed a bill in Chancery for an injunction, and for relief; but, on coming in of the answer, the injunction was dissolved. In *May*, 1770, *Cox* sued a *latitat* in the King's Bench against *Chubb*, and held him to bail for 1300*l.*; but was non-prossed, Cox v. Chubb, C. B. P. 12 G. 3. 2 Bl. 809.

for want of a declaration. In *Michaelmas* Term, 1770, *Cox* applied to this court to be discharged out of custody, as having satisfied the debt and execution; but, on cause shewn, the court discharged the rule. In the next vacation he sued out another *latitat* in the King's Bench against *Chubb*, but did not hold him to bail; to which *Chubb* appeared, but there were no further proceedings. In *Hilary* Term, 1771, he again applied to this court to be discharged; but he was refused a rule to shew cause. On the 8th of *July*, 1771, the cause in Chancery was heard before the Master of the Rolls; who decreed *Cox* to pay 215 *l.* into the Bank, and then to be discharged; which he had not yet done, but remained still in custody. And now, in *March*, 1772, he brings the present action against *Chubb*, and holds him to bail for 1800 *l.*

And *per tot. Curiam.*—This proceeding appears to be vexatious; and, therefore, let the defendant be discharged on common bail.

And Gould, *Justice*, was for staying proceedings till the costs of the former actions were paid; on account of this accumulated vexation. De Grey, *Chief Justice*, and Blackstone, *Justice, contra:* for the merits have never yet been tried, which was the foundation for all the precedents, alleged for such stay of proceeding. Nares, *Justice, dubitante*, on the latter part of the rule.

Former part for discharging on common bail, made absolute:—latter, for staying proceedings *quousque*, discharged.

IT hath been determined, that the proceedings in a second action, by an *executor* or *administrator*, shall not be stayed till the costs of a discontinuance, or nonsuit in a former action, between the same parties for the same cause, are paid. Holsey v. Mullins, B. R. H. 5 G. 2. 2 Barnard. K B 94. Bird v. Smith, B. R. T. 5 G. 2. Ibid 154. S. C. 2 Kely. 70.

THE court will not stay proceedings in an action until the debt and costs recovered by the defendant in two former actions against the plaintiff have been paid, notwithstanding it be sworn that since the commencement of those actions, the defendant had never had any dealings with the plaintiff, and that the present action was founded upon the same circumstances with the others. Cooke v. Dobree, C. B. P. 28 G. 3. H. Bl. 10.

SECT. III.

In what Cases, the Costs of one Action shall be deducted from those of another.

FORMERLY a notion prevailed, that the courts were not authorized, to grant a rule in cross actions, for deducting the costs of one action from those of the other; and the reason then given was, that it required the assistance of an act of parliament to enable the defendant in an action to set off a mutual debt, and that act did not extend to the case of costs. Duthy v. Tito, et vice versâ. 2 Str. 1203. Powel v. Smith, B. N. P. 336. Goodtitle ex Dim. Clewlow v. Lowe, Barnes, 130. Ford v. Miles, cit. Ibid 131.

BUT whatever doubts might be once entertained upon this point, the courts have frequently, of late, exercised the power of directing the costs of cross-actions to be set against each

other. And this does not depend on the statutes of set-off, but on the general discretionary power of the courts over their suitors, by the common law.

Scoffin v. Robinson, P. 26 G. 2. Barnes, 145.

Scoffin recovered a verdict, in an action of trespass, against *Robinson*, who, at the same assizes, in an action of ejectment on his own demise, recovered a verdict against *Scoffin*. And, upon motion, the Court of Common Pleas made a rule for setting off and deducting the costs, to which *Robinson* was entitled, out of those to be allowed to *Scoffin*.

Roberts v. Biggs, T. 27 G. 2. Barnes, 146. S. C. B. N. P. 336.

So where *Roberts* had brought an action against *Biggs* and others, and recovered for damages and costs 17*l.* 11*s.*; and *Biggs* had brought a cross-action against *Roberts*, in which there was a verdict for the plaintiff, with damages and costs to the amount of 70*l.* 10*s.*—the Court of Common Pleas, upon motion, ordered that upon *Biggs'* acknowledging satisfaction for 17*l.* 10*s.* on the record in the cause in which he was plaintiff, the plaintiff in the other cause, in which he (*Biggs*) and others were defendants, should be restrained from taking out execution.

And the court have not only allowed costs to be set off against costs, but they have also allowed them to be set off against *damages and costs*; and against *debt and costs*.

Roberts v. Mackoul, C.B. T. 9 G. 3. Say. Costs, 254. S. C. cited 2 Bl. 827.

As where, upon a rule to shew cause why thirteen guineas, taxed for costs against the plaintiff in a former action, brought by the plaintiff against the defendant, and *J. S.* should not be set off against sixteen guineas, taxed for the plaintiff for

damages and costs in the present action; and why, on payment of the balance, proceedings upon the judgment in the present action should not be stayed,—it was shewn for cause, that the plaintiff was insolvent; and, that his attorney had a lien, upon these costs, for his bill, of which he would be deprived, if the rule were made absolute.

WILMOT, *Chief Justice*.—The setting off of one demand against another, which has not long been expressly allowed by our law, was allowed by the *Roman* law, and is agreeable to natural justice. An attorney has, as between himself and his client, a lien for his fees and disbursements upon the damages and costs recovered in an action: but he, equally with his client, is subject to the rules of natural justice; and, consequently, the costs taxed for the defendant in the former action, may as well be deducted from the damages and costs taxed for the plaintiff in the present action, as if the plaintiff's attorney had no lien upon those damages and costs.

Per Curiam. Rule absolute.

Thrustout ex Dim. Barnes v. Craster, C. B. T. 12 G. 3. 2 Bl. 826.

AGAIN, *Barnes*, the lessor of the plaintiff, had a judgment last *Michaelmas* Term, for 40*l.* 5*s.* against the defendant, for his debt and costs, in an action for the use and occupation of the premises; but was nonsuited in the present cause, the *Hilary* Term afterwards; the costs of which were taxed at 12*l.* 5*s.* for non-payment whereof an attachment had been taken out against the plaintiff.

MOTION on the part of the plaintiff, that the 12*l.* 10*s.*

might be deducted out of the 40*l.* 5*s.* and proceedings, on the attachment, be stayed.

AND by DE GREY, *Chief Justice*, GOULD, BLACKSTONE, and NARES, *Justices*.—This point is already settled by several determinations; and on the justest ground. Rule absolute.

AND this equitable principle has been carried so far, that, if there be several actions brought upon two policies of insurance, underwritten by the same parties, and the actions on each be respectively consolidated, after which the plaintiff, in one of the consolidated causes, becomes entitled to costs, and, in the other, the defendant,—the court will, on motion, direct the costs taxed and allowed to the defendant to be set off against those taxed and allowed to the plaintiff, although the same underwriter should not be defendant in both actions.

Nunez, administrator of Nunez v. Modigliani and Modigliani, C. B. P. 29 G. 3. H. Bl. 217.

THUS, in *Easter*-Term, 1788, the plaintiff brought several actions against the defendant and other underwriters, on two policies of insurance; the first effected in the year 1784, on a homeward bound ship of the intestate's, the second in 1785, on the same ship outward bound. The same parties underwrote both the policies. The actions on each, being respectively consolidated, *Nathan Modigliani* was made defendant in the former, and *Hannanel Modigliani* in the latter. The first came on to be tried at *Guildhall* at the sittings in *Hilary* Term, when, on application from the defendant's attorney, the cause was put off to a future time, on his consenting to pay the plaintiff the costs of the day; and

an order of *nisi prius* for that purpose, was, afterwards, made a rule of court.

THE action on the second policy, was to have been tried at the sittings after *Hilary* Term, but the plaintiff withdrew the record, and thereby became, though an administrator, liable to pay the costs of the action. Vide ante, 190, &c.

THE costs of the first action having been taxed and allowed to the plaintiff, a rule was granted to shew cause why the prothonotary should not review his taxation, and why the costs which should be taxed and allowed to the defendant in the second action, should not be set off against those taxed and allowed to the plaintiff in the first.

THE Court said, that if it had been decided in the case of *Scboole* v. *Noble* (*a*) in this court, that an attorney had only such a lien on the costs, as was subject to the equitable claims of the parties in the cause. In this case, it was consistent with justice to allow the set off, as the defendant, *Nathan Modigliani*, was a party to both actions; in one, being made defendant on the record, in the other, being within the rule to consolidate. Rule absolute.

(*a*) H. Bl. 23.

So, if *A.* be equitably entitled to the costs of a nonsuit in an action by *B.* against *C.* and liable to pay the costs of a nonsuit in an action by himself (*A.*) against *B.*;—the costs of the nonsuit in the action by *B.* against *C.* may be set off against the costs of the nonsuit in the action by *A.* against *B.*

O'Connor v. Murphy, C. B. T. 31 G. 3. H. Bl. 657.

As where, upon a rule to shew cause, why the costs of a nonsuit in an action of *trover*, brought by *Murphy* the present defendant, against one *O'Loughlin*, should not be set off against the costs of a nonsuit in this cause, it appeared, that the action of *trover* had been brought for a ship claimed by *Murphy*, but which proved to be the joint property of *O'Connor*, the present plaintiff, and one *O'Sullivan*, (who were partners in trade) and of which *O'Loughlin* was the master. The present action was brought by *O'Connor* as indorsee of a promisory note against *Murphy* as drawer, in which *O'Connor* was nonsuited: and he now made this application, upon the ground, that the action against *O'Loughlin* was defended at the joint expence of *O'Connor* and *O'Sullivan*, and that *O'Sullivan* was *interested* together with *O'Connor* in the promisory note, on which the present action was brought.

Lord Loughborough said, that without any regard to *O'Sullivan*'s interest in the promisory note, *O'Connor* was equitably entitled to the costs of the nonsuit in the action of *trover* against *O'Loughlin*, and therefore he ought to be permitted to set them off, as far as they would go, against the costs in the present action. Rule absolute.

H. Bl. 23.

As the Common Pleas have determined, that the lien, which an attorney has for his bill of costs upon a judgment recovered, is subject to the equitable claims of the parties in the cause, that court, it should seem, do not, in making a rule for deducting the costs of one action from the costs, or damages and costs in another, advert at all to the situation of the respective attornies in the actions. But the practice of

Vide antè Roberts v. Mackoul, and Nunez v. Modigliani.

the King's Bench differs in this respect from that in the Common Pleas, for in the following case the former court held that, where *A.* recovers against *C.* and *C.* recovers against *A.* and *B.*—*C.* shall not be permitted to set off the damages which he has recovered against those obtained by *A.* except he undertake that the bill of *A.*'s attorney in the first action shall be satisfied.

Mitchell v. Oldfield, B. R. H. 31 G. 3. 4 T. R. 123.

In this action, the plaintiff recovered a judgment against the defendant for 182*l.* 10*s.* But the defendant, having also recovered in another action against this plaintiff and another, obtained a rule to shew cause why the debt and costs in the latter should not be set off against the judgment in the former action; suggesting (amongst other reasons) that *Mitchell* had absconded.

Bearcroft now shewed cause, on behalf of *Mitchell*'s attorney in the first action; contending, that, as he was not concerned as attorney in the other action, he had a lien for his costs on the judgment obtained by his client. He also hinted, that, perhaps, the Court would not interfere at all in this case; inasmuch as one debt was due to the plaintiff alone, whereas the other was the joint debt of the plaintiff and another to the defendant; and he observed, that this was not such a debt as could be set off under the statute. But,

Lord Kenyon, *Chief Justice*, said, that this did not depend on the statutes of set-off, but on the general jurisdiction of the court, over the suitors in it; that it was an equitable part of their jurisdiction, and had been frequently exercised.

But, as to the other point, he observed, that the attornies and solicitors of the different courts have a lien on all papers in their hands, and judgments recovered for their costs; that in the Court of Chancery they were permitted to retain title deeds for that purpose; and he thought it right that the attorney, in this case, should be satisfied for his costs, before the defendant was allowed to make the set off.

Vide 3 T. R. 275. 3 Atk. 720. Doug. 2 Edit. 104. 238. H. Bl. 122.

BULLER, *Justice*.—Though this court have said that they will not interfere on the behalf of the attorney, and prevent the plaintiff settling his own cause without first paying the attorney's bill, yet when the adverse party, against whom a judgment has been obtained, applies to get rid of that judgment, the Court will take care that the attorney's bill is satisfied.

Vide Doug. 2 Edit. 238. H. Bl. 122.

The Court made the rule absolute, on the defendant's undertaking to pay the attorney's bill, and on his entering a *remittitur* in the cause in which this defendant was plaintiff.

CHAPTER IX.

IN WHAT CASES, THERE SHALL BE DOUBLE OR TREBLE COSTS.

WHERESOEVER a statute, subsequent to that of *Gloucester* increases damages to the double or treble value, in a case, where damages were recoverable at the common law, a plaintiff shall, in an action upon such subsequent statute, not only recover the double or treble damages thereby given, but also *double* or *treble costs*, and this notwithstanding the statute increasing the damages, makes no mention of costs.

2 Inst. 289. 10 Co. 116. a. March 29. Carth. 297. 1 Ld. Raym. 20. Gilb. H. C. P. 267, 8. Cowp. 368.

FOR instance, by the 2 *Hen.* 4. c. 11. double damages are given to a plaintiff, who has been sued in a court of Admiralty, for a thing done upon land, but nothing is there said concerning *costs*.—Now, if the plaintiff prevail in an action founded upon this statute, besides his double damages, he shall have double costs; and the reason is, that no court of Admiralty has a jurisdiction in matters arising upon land, and, at common law, an action upon the case lay for suing in a court, not having jurisdiction.

Bilota v. Pointel, Dyer 159. b. pl. 38. 10 Co. 116. a. 1 Ro. Abr. 517. pl. 5. S. P. Sands v. Child, 3 Lev. 355. Smith v. Dunce, 2 Str. 1048.

So, in an action upon the 8 *Hen.* 6. c. 9. s. 6. (which gives treble damages for a forcible entry,) the plaintiff, if he prevail, shall have treble costs as well as treble damages, al-

Yearb. 14. H. 6. 13. pl. 44. 22 H. 6. 57. pl. 6. 2 Inst. 289. 10 Co. 116. b. 1 Vent. 22. 1 Leon. 282. 2 Leon. 52.

Gouldsb. 12. Co.Litt.257.b. Cro. Eliz. 582. Bro. Abr. Tit. Costs, pl. 12. 14. 16.

though this statute is silent with respect to costs, because single damages were recoverable in an action for a forcible entry at common law.

Hardr. 152. 2 Inst. 289. 10 Co. 116. a. Gilb. H. C. P. 268. Cowp. 368.

On the other hand, if a statute, posterior to that of *Gloucester*, give either single, double, or treble damages, in a case, where none were recoverable at the common law, without adding or mentioning costs,—a plaintiff, in an action upon such subsequent statute, can only recover the damages thereby given (whether single, double, or treble,) and *no costs*; because the statute of *Gloucester* does not operate to add costs to the damages which are newly given by a subsequent statute.

Sed vide ante, 8, &c.

The distinction above taken with respect to costs between cases where damages are newly given by a statute subsequent to that of *Gloucester*, and those wherein damages are only increased by such subsequent statute, is fully exemplified in an action of waste; where, if it be brought against tenant for life or years, the plaintiff shall recover the place wasted, and treble damages, by virtue of the statute of *Gloucester*, c. 5. but no costs, because no damages were recoverable at the common law in waste against such tenants. But if it be brought against a guardian, or tenant in dower, there the plaintiff shall recover treble damages and treble costs, because against these tenants an action of waste was maintainable at common law, in which damages might be recovered, and the said statute of *Gloucester*, c. 5. giving treble damages, in actions of waste, trebles the costs also as parcel of the damages.

Vide ante, 8.

2 Inst. 289. 1 Ro. Abr. 516. Dy. 177. b.

By the 1 and 2 *P.* and *M.* c. 12. five pounds penalty and

treble damages are given to the party grieved, for driving a distress out of the hundred, wherein it was taken, but no costs; —therefore, in an action thereon, the plaintiff cannot recover costs, because the statute does not mention costs, and no damages were recoverable in such a case at common law.

WHERE a statute gives "*treble damages and costs of* "*suit*," the costs shall be trebled as well as the damages.

THUS, it is enacted by the statute 2 *Will.* and *Mar. sess.* 1. c. 5. s. 4. that, upon any pound-breach or rescous of goods or chattels distrained for rent, the person grieved shall, in a special action upon the case, recover his *treble damages and costs of suit* against the offender or offenders, &c. After a verdict for the plaintiff, in an action upon this clause of the statute, the question was, whether the plaintiff's costs, as well those given by the court *de incremento*, as those given by the jury, should be *trebled*, as well as the damages?

Sir Wilfred Lawson v. Story, B. R. M. 6 W. and M. Carth. 321. S. C. 1 Ld. Raym. 19. Skin. 555. Holt, 172. Salk. 205. S. P. 1 Lill. Abr. 468. E.

IT was argued for the defendant, that they should not; because that at common law the word *damna* included as well damages as costs, and therefore, if the statute had given treble damages without saying more, the costs had been treble also. But when the parliament inserts the word costs after the word damages, it shews that it was not their intent that costs should be included in the word damages, for then it had been vain to insert the word costs; but it was their intention to make a distinction between the costs and damages. And, by the omission of the word treble, when the costs are

spoken of, it is apparent that it was their intent that the party should recover treble damages, but only single costs.

Sed per Curiam.—Both the costs *de incremento* and those assessed by the jury shall be trebled, as well as the damages. This case falls within the rule laid down in *Pilfold's* case, (10 *Co.* 116.) that, where a statute gives double or treble damages in a case, in which single damages were recoverable at common law, in an action upon such statute the plaintiff shall have double or treble costs, as the case may be: now this statute is not a *creative* but an *accumulative* statute,—an action upon the case lying for a rescous at the common law. And moreover in the construction of the 2 *W.* and *M.* c. 5. the word *treble* shall be referred, as well to the word *costs*, as to the word *damages*.

By the 28th sect. of the 25 *Geo.* 3. c. 50. (an act for granting to his majesty certain duties on certificates, issued with respect to the killing of the game;) it is enacted, that if any person shall at any time be sued, molested or prosecuted, for any thing by him *done or executed in pursuance of that act, or of any clause, matter, or thing therein contained*, such person may plead the general issue, &c. and if the plaintiff be nonsuited, or the defendant obtain a verdict, such defendant shall be awarded his treble costs (1.)

Smith v. Wallis B. R. P. 26 G. 3. 2 T. R. 252.

It hath been determined, that this clause only extends to

(1) The 31 *Geo.* 3. c. 21. (entitled "an act for granting to his majesty "an additional duty on certificates "issued with respect to the killing "of game,") contains a similar clause.

give treble costs to those persons, who are sued for something done in the execution of the act, and not to give treble costs to persons sued for penalties under the act. Therefore, a person, prosecuted on this statute for shooting without a certificate, is not entitled to treble costs, on obtaining a verdict.

WHERE treble costs are to be recovered against a prosecutor for a matter not appearing on the *postea*, the court will, on motion, allow a suggestion of the special matter to be made on the record.

THUS, upon a motion for treble costs against the prosecutor of an indictment against the defendant for illegally exercising the trade of a glover, it appeared, by affidavit, that the defendant was a soldier, and disbanded upon the peace of *Ryswicke*. The 10 and 11 *W.* 3. c. 11. having enacted, "that the soldiers time shall be taken as if actually served, "and if they be indicted they shall be acquitted on the ge- "neral issue, and recover *treble costs*," the only doubt, in this case, was whether such costs should be ordered by a rule of court, founded upon the affidavit; or whether a suggestion should be made of the special matter, upon the record? And the following cases were cited upon the subject. *Walker* v. *Sir Philip Egerton, Hil.* 7. *W.* 3. There the defendant was collector of the land tax, and the plaintiff being doubly taxed as a nonjuror, and distrained upon, brought an *indebitatus assumpsit* against the collector for the redemption-money. And though nothing of this appeared upon record, yet, on affidavits of the fact, the Court directed a suggestion to be made upon the record,—"because it appears to the Court

Rex v. Poland, B. R. P. 3 G. 1. 1 Str. 49.

"upon examination, that, &c. therefore, it is considered, &c." So in *Bateman* v. *Wallis*, *Trin.* 9 *W.* 3. *B. R.* which was an *indebitatus assumpsit* for a cause arising in *Newcastle*, and a verdict under 40*s.*; the custom of *Newcastle* was suggested, that the plaintiff should not recover, but pay costs. And so was the case of *Brampton* v. *Crabb*, *Hil.* 3 *Geo.* 1.

AND upon these authorities, the Court ordered a suggestion to be made upon the roll in the principal case, in these words, —"Because it appears to the Court upon the oath of two "credible witnesses, that," &c. (1.)

Harper v. Sherrard, H. 20 G. 2. Barnes, 136.

A DEFENDANT having pleaded his discharge under a statute for the relief of insolvent debtors, and obtained judgment, became entitled, under such statute, to treble costs. Upon this a question arising, from what time such costs ought to be computed? a rule was entered into by consent, that the defendant should have treble costs from the time of his plea.

Vincent v. Strode, B. R. M. 5 G. 1. Vin. Abr. Tit. Costs, (T) pl. 18.

IF the defendant, in a case in which he is entitled to treble costs under a statute, as upon a nonsuit in an action against him for the penalty incurred by acting as a commissioner of the land-tax, not having 100*l. per annum*, procure single costs only to be taxed as in the case of an ordinary nonsuit, and actually receive and give a receipt for the same, he is thereby concluded;—and notwithstanding he afterwards obtain a certificate from the judge, who tried the cause, that

(1) For the cases, in which the Court has allowed similar suggestions to be entered on the record, to entitle persons, sued on account of something done by virtue of particular offices, to double or treble costs; vide ante, 240.

he was an acting commissioner, he cannot have treble costs.

IT is laid down in one case, that, where a statute entitles a person to double or treble costs, it means that the costs assessed by the jury only shall be doubled or trebled, and not those given *de incremento* by the Court.

Trelawney v. Babb, B. R. H. 16 Car. 2 Danv. Abr. 221. pl. 7. 1 Ro. Abr. 517. pl. 7, 8.

BUT the contrary was ruled in two cases prior in point of time to the resolution in *Trelawney* v. *Babb*, namely, that the costs *de incremento*, as well as those given by the jury, should be doubled or trebled.

Thoroughgood v. Scroggs, B. R. M. 39 and 40 Eliz. Cro. Eliz. 582. Rollston v. Chambers, C. B. M. 29 Eliz. 1 Leon. 282. 2 Leon. 52.

AND in conformity with the cases last cited, it has been since repeatedly adjudged, that there is no distinction between the costs given by the jury and those given by the Court; but that, wheresoever a person is entitled to double or treble costs, not only those assessed by the jury, but also those adjudged *de incremento* by the Court, shall be doubled or trebled.

Sands v. Child, B. R. P. 5 W. and M. 3 Lev. 355. Sir Wilfred Lawson v. Story, B. R. T. 6 W. and M. Carth. 321. Skin. 555. Holt, 172. Smith, *qui tam*, v. Dunce, B. R. T. 9 G. 2. 2 Str. 1048.

CHAPTER X.

OF THE LIABILITY OF AN ATTORNEY TO PAY COSTS; OF TAXING, AND OF HIS LIEN ON DEEDS, &c. FOR, HIS BILL.

SECT. I.

Of the Payment of Costs by an Attorney.

SECT. II.

Of taxing an Attorney's Bill of Costs, and also of his Lien on Deeds, &c. for such Bill.

SECT. I.

Of the Payment of Costs by an Attorney.

WHERE either of the parties in a suit is made liable to the payment of costs, or has actually paid costs, through the gross negligence, gross ignorance, or gross misbehaviour of his attorney, the Court will, upon motion, order such attorney, in the former case, to pay the costs instead of his client, and, in the latter, to reimburse him.

Vide 1 P. Wms. 593.

THUS, after a verdict for the plaintiff, several objections were made in arrest of judgment; the principal of which were, that though the action was trespass upon the case, the *jurata*

Fowke v. Horabin, T. 13 and 14 G. 2. Barnes, 11.

at the foot of the record of *nisi prius* was in trespass only. That instead of saying, unless the Chief Justice should come before *on* the 12th of *July*, it was said, unless he should come before the 12th of *July*. That two of the defendants being sheriff of *Middlesex*, the *venire facias* was awarded to the coroners, but, by the *jurata*, the writ was alleged to be delivered to the *sheriff* to be executed. That the writ of *venire facias* instead of being made returnable in court, was made returnable before the Chief Justice. And that the declaration recited an original against *James Brooke* and others, and counted against the said *John Brooke*. As to the first objection, the Court held it to be helped by the statute of *jeofails*. As to the second objection, by the writ of *habeas corpora juratorum* the day of trial was rightly appointed, and the *jurata* is amendable by the writ. As to the third objection, the *venire facias* appeared to be returned by the coroners, and the *jurata* is only wrong by the misprision of the clerk. The return of the *venire facias*, though defective, is within the statute of amendment. And as to the last objection, the word *John* in the declaration must be rejected, and then the count will stand against the said *Brooke*, which must be the *James Brooke* before mentioned.

THE Court, having ordered the necessary amendments to be made, discharged the rule for staying the entry of final judgment; and directed the plaintiff's attorney, whose gross blunders had rendered the amendments necessary, to pay the costs.

So where it appeared, that the plaintiff's attorney had committed many mistakes in the copy of a *capias*, the Court made a rule upon him to shew cause, why he should not pay to

White v. Washington, M. 12 G. 2. Barnes, 411. S. C. Cas. Pr. C. P. 152.

both plaintiff and defendant the costs of the proceedings, motions, &c. occasioned by such his negligence and inattention.

Arden v. Lamley, P. 8 G. 2. Barnes, 250.

A WRIT of error being brought, the plaintiff's attorney artfully delayed signing his final judgment, till the writ of error was spent, and then brought an action of debt upon the judgment. The Court ordered proceedings in the action upon the judgment to be stayed, and a new writ of error to be brought at the expence of the plaintiff's attorney.

Lamb v. Goodenough, executor, P. 21 G. 2. Barnes, 358.

IT appearing, in another case, that *A. R.* the defendant's attorney, had eleven years before, without the defendant's order or privity, fraudulently pleaded two judgments, one on a bond to the defendant himself, the other on a bond to a person to whom the defendant was executor, although he knew that they were satisfied, having himself received the money;—on defendant's motion, a rule was made calling upon the plaintiff to shew cause, why these judgments should not be struck out of the plea, and upon *A. R.* to answer the matters in the affidavits. After hearing all parties, a rule was made, by consent, that *A. R.* should pay the plaintiff's costs *ab initio*, upon which the plaintiff should discontinue his action, that *A. R.* should also pay the costs of the application on both sides, and that the defendant should not bring any action against him on account of any thing relative to this transaction.

Macdonald v. Gunter, H. 9 G. 2. Barnes, 335. S. C. Cas. Pr. C. P. 128.

So where the declaration, in an action of trespass, for breaking and entering the plaintiff's house and taking away his goods consisted of four counts; which were precisely the same, except in a slight variation in the description of the

goods carried away, and stating the trespasses to have been committed on different days;—the Court, on motion, ordered two of the counts to be struck out, and the plaintiff's attorney to pay the costs, the action appearing to be brought for one and the same trespass.

So where the defendant, after obtaining time to justify bail upon the usual terms of pleading issuably, and taking short notice of trial for the last sitting within the term, pleaded a recovery in the King's Bench;—the Court, upon motion, made a rule to shew cause why the plea should not be set aside, and why the defendant's attorney should not pay the costs of the application; which was, afterwards, made absolute.

Cave v. Aaron, C.B.M. 10G. 3. 3 Wils. 33 Vide 1 Bl. 376.

Again, to an action of debt on bond, the defendant, after craving *oyer*, set it out truly, and pleaded payment by the principal, he being a surety. Plaintiff replied, and put the pleas in issue, and then served the defendant's attorney with a rule to abide by his pleas, and gave notice of trial. The defendant returned the paper-book; setting out a false *oyer* of the bond, and pleading as before. On which the plaintiff enrolled the true condition, and demurred.

Ferguson, Bart. and others, v. Mackreth, B. R. H. 24 G. 3. 4 T. R. 371 n. (b.)

On the day of argument, which was the last paper-day of the term, the defendant's counsel objected to it's being argued, because it was the last paper-day. But,

The Court,—on hearing the above facts stated, directed an affidavit of them to be made; made a rule *nisi* for striking out all the pleadings of the defendant, that the plaintiffs

should have judgment; and that the defendant's attorney should pay all the costs. And they intimated a strong inclination to grant an attachment against him.

Atkinson v. Burton, B. R. P. 30 G. 2. Say. Costs, 311. Vide 2 Bl. 954.

THE plaintiff had a right, by the practice of the court, to sign judgment for want of a plea on *Tuesday* afternoon. On the day before, his attorney was served with a judge's summons, to shew cause at six in the afternoon of the *Tuesday*, why the defendant should not have further time to plead. Notwithstanding this summons, judgment was signed in the afternoon of the *Tuesday*. Upon motion to set this judgment aside, the Court said that, as it was strictly regular, nothing being stayed by a judge's summons, it could not be set aside without costs; and, being of opinion that there had been in this case, very sharp practice, they made a rule upon the plaintiff's attorney to shew cause why the costs should not be paid by him.

Valentine v. Hawkins, P. 21 G. 2. Barnes, 419.

Currer the elder, the plaintiff's attorney, in order to favour his son *Currer* the younger, who was filazer of *Suffolk*, although the cause of action arose in *Kent*, and both the plaintiff and defendant resided in that county, and had never had any dealings together in *Suffolk*, sued out a *testatum capias* from *Suffolk* into *Kent*, out of his son's office, in the name of one *Mulliner* an attorney, instead of a *capias* into *Kent* from the proper filazer. The Court held this to be unwarrantable and irregular, and set aside the proceedings with costs, to be paid by *Currer* the elder, to both parties.

Craven v. Billingsley, M. 24 G. 2. Barnes, 47.

IT being stated, in another case, on the behalf of one of the defendant's bail, that he had been compelled to pay to

the plaintiff the debt and costs, by a prosecution on the bail-bond, through the misconduct of Mr. *Skinner* an attorney, employed by the defendant, who had put in bail in the Court of King's Bench instead of this court; and it not being controverted by *Skinner*'s counsel, for want of proper instructions, that he was an attorney of this court, a rule was made absolute upon him to reimburse the bail. But it afterwards appearing, that *Skinner* was not an attorney of this court, and that he never acted by himself, or in the name of any other attorney in any one instance in this cause in this court, the rule was discharged.

If the plaintiff's attorney neglect to produce his client within the time limited by a judge's order for that purpose, in consequence of which the defendant signs judgment of *nonpros*, the court will, on an affidavit that no such person as the plaintiff can be found, make a rule upon the attorney to pay the costs to the defendant.

Gynn v. Kirby, B. R. M. 7 G. 1. 1 Str. 402. Vide Ibid. 705. Barnes, 126. H. Bl. 534.

And it is incumbent upon an attorney to proceed in a suit commenced upon the credit of a client, although the client should not furnish him with money; therefore, if, on that account, he neglect to proceed according to the practice of the court, whereby judgment of *nonpros* is signed against the plaintiff, the court will make a rule upon the attorney to pay the costs of such judgment, together with those of the application.

Mordecai v. Solomon, B. R. M. 28 G. 2. Say. Rep. 172.

In the foregoing cases, the Court appear to have examined into the conduct of the respective attornies in a summary way, upon motion, and, where they found it reprehensible,

or injurious to the parties, to have administered complete redress, immediately, by a rule of court.

Barker v. Buther, C. B. T. 11 G. 3. 2 Bl. 780.

Vide Say. Rep. 50. 169. 4 Burr. 2060.

HOWEVER, in *Barker* v. *Buther*, where *Hatt* the plaintiff's attorney had declared, in trespass, assault, and false imprisonment, (instead of *case*) for a malicious arrest and prosecution, and the defendant after pleading in justification, that the arrest was made by process from the Palace-court, *non-prossed* the plaintiff for want of a replication, the Court refused to grant a rule on *Hatt*, the attorney, to return to the plaintiff the sum of 11 *l.* 15 *s.* 2 *d.* the costs of the *nonpros*, and for which the plaintiff had been taken in execution; but left the plaintiff to his ordinary remedy.

IF an attorney not only join in an affidavit to support a frivolous complaint against a justice of the peace, but also use expressions indicating personal ill-will towards the defendant, the court will order him (the attorney) to pay costs, as well as his client.

Rex v. Fielding, Esq. B. R. M. 32 G. 2. 2 Burr. 654.

As where, upon shewing cause why an information should not be granted against Mr. *Fielding*, for a misdemeanor in his office of a justice of the peace, the complaint appeared to be frivolous and vexatious; so that the justice ought to have the costs, to which he had been put, in defending himself against it. The only question was, who should pay them?

THE complaint was grounded upon a joint affidavit made by the prosecutor and his attorney; the latter of whom was also sworn to have declared (and in rude and virulent terms too,)—"that if it should cost him one hundred pounds, he "would lay *Fielding* by the heels."

It was strongly urged, on behalf of the attorney, that it would be a very great discouragement to attornies, in the course of their practice, if *they* were to be made personally liable to costs, in case their client's motions should not succeed, which motions they had engaged in at the application of their clients, and upon facts represented to them by their clients, as being true and candidly stated; and which they themselves could not know or suspect to be otherwise. And that it would be still more hard to do this, without hearing what they could urge in their own defence.

But the Court were clear and unanimous, that, in this case, they might and ought to do it; because the attorney not only appeared as prosecutor, by joining in the original affidavit of complaint; but had also expressly declared, (1) that, if it should cost him one hundred pounds, he would lay *Fielding* by the heels. Therefore, they discharged the rule; with costs to be paid by both.

If in an affidavit of service upon a bankrupt's assignee (who was petitioned against to be displaced), with a view to enhance the expence, the whole petition be recited *verbatim*, the Lord Chancellor will order the attorney, who drew it, to pay the costs out of his own pocket.

Ex parte Smith, in Chancery, March 31, 1742. 1 Atk. 139.

Although the name of a plaintiff in an ejectment happen to be the same as that of a real person residing in the same town with the attorney for the plaintiff, yet if such attorney

(1) The attorney, by a subsequent affidavit, denied this; however the rule stood, as above.

use it purely as fictitious, and not as the name of an existing or real person, he will not be personally liable to costs.

Orion v. Mee, M. 25 G. 2. Barnes, 188.

THUS where *Orion*, the defendant, in an action of ejectment brought in the name of *Jacob Mee*, on the joint and several demises of *Powers*, and *Maddison*, having obtained a verdict, and one of the lessors being dead, and the other insolvent, brought debt on the judgment against the plaintiff, and served process upon one *Jacob Mee*, of *Saint Ives*. Upon which *Mee* moved to stay proceedings, being totally ignorant of, and unconcerned in the matter. On shewing cause, Mr. *Huske*, of *Saint Ives*, was alleged to be the attorney for the plaintiff in the action of ejectment, wherein *Mee*'s name had been used. The rule was thereupon enlarged, and *Huske* ordered to shew cause why he should not pay *Orion*'s costs in the ejectment. *Huske*'s affidavit being laid before the Court, it appeared, that not he, but one *Stephenson*, formerly his clerk, (to whom he had resigned his business long before the said ejectment, and had entirely left off practice,) was the plaintiff's attorney. *Stephenson* made affidavit, that he found *Jacob Mee* to be the usual name made use of for a plaintiff in ejectment in *Huske*'s office; that he used it purely as fictitious, and not as the name of an existing or real person.

THE Chief Justice was of opinion that, although *Stephenson* might have made a fictitious plaintiff, yet as he had voluntarily made use of a good plaintiff, a real person, dwelling in the same town with himself, he ought to stand in his place, and pay the costs. But the three other judges thought,

that this proceeding was to be considered purely as fictitious; and not real; and that *Jacob Mee*, of *Saint Ives*, or any other person in human nature, was not to be taken to be the real plaintiff. It would be a dangerous precedent, with respect to attornies, to make them liable to pay costs, whenever a defendant in ejectment (the lessors of the plaintiff being insolvent) can find out a real person of the same name as the fictitious plaintiff. The nominal plaintiff and casual ejector stand in the same light;—the former cannot release the action; the latter cannot bring a writ of error. *Stephenson* appears to be guilty of no imposition, or misbehaviour. Rule absolute to stay proceedings against *Mee*; discharged as to *Huske*; and no rule upon *Stephenson*;—in which the Chief Justice acquiesced.

SECT. II.

Of taxing an Attorney's Bill of Costs, and also of an Attorney's Lien on Deeds, &c. for such Bill.

No attorney shall be allowed for fees to counsel, &c. without a ticket under the hand of such counsel, testifying the sums received, &c.

THE statute of 3 *Jac.* 1. c. 7. s. 1. enacts "That no attorney, solicitor, or servant to any, shall be allowed from "his client or master, of or for any fee given to any serjeant "or counsellor at law, or of or for any sum or sums of "money given for copies to any clerk or clerks, or officers in "any court or courts of record at *Westminster*, unless he "have a ticket subscribed with the hand and name of the same "serjeant or counsellor, clerk or clerks, or officers aforesaid, "testifying how much he hath received for his fee, or given

And every attorney shall deliver a true bill of charges, subscribed with his name, to his clients,

" or paid for copies, and at what time, and how often: and " that all attornies and solicitors shall give a true bill unto " their masters or clients, or their assigns, of all other charges " concerning the suits which they have for them, subscribed " with his own hand and name, before such time as they or " any of them shall charge their clients with any the same

If an attorney delay his client's suit, or demand by his bill more than is due, the party grieved may have an action against him, and recover therein costs and treble damages.

" fees or charges: and if the attorney or solicitor do or " shall willingly delay his clients suits to work his own gain, " or demand by his bill any other sums of money, or al- " lowance upon his account of any money which he hath " not laid out or disbursed, that, in every such case, the " party grieved shall have his action against such attorney " or solicitor, and recover therein costs and treble damages, " and the said attorney or solicitor shall be discharged from " thenceforth from being an attorney or solicitor any more."

No attorney or solicitor to commence any action for fees, until one month after delivery of his bill, subscribed with his proper hand.

THE 2 *Geo.* 2. c. 23. s. 23. enacts,—" That no attorney " or solicitor of any of his majesty's courts of law or equity " at *Westminster*, or of the court of the Duchy Chamber of " *Lancaster*, at *Westminster*, or of any of his majesty's courts " of Great Sessions in *Wales*, or of any of the courts of the " counties palatine of *Chester*, *Lancaster*, or *Durham*, or of " any other court of record, or inferior court of equity, in " that part of *Great Britain*, called *England*, shall commence " or maintain any action or suit for the recovery of any fees, " charges, or disbursements at law, or in equity, until the " expiration of one month or more, after such attorney or " solicitor respectively shall have delivered unto the party or " parties to be charged therewith, or left for him, her, or " them, at his, her, or their dwelling-house, or last place of

" abode, a bill of such fees, charges and disbursements, writ-
" ten in a common legible hand, and in the *English* tongue
" (except law terms and names of writs,) and in words
" at length (except times and sums) which bill shall be sub-
" scribed with the proper hand of such attorney or solicitor
" respectively; and upon application of the party or parties
" chargeable by such bill, or of any other person in that behalf
" authorized, unto the Lord High Chancellor, or the Master
" of the Rolls, or unto any of the courts aforesaid, or unto a
" judge or baron of any of the said courts respectively, in
" which the business contained in such bill, or the greatest
" part thereof in amount or value, shall have been transacted;
" and upon the submission of the said party or parties, or
" such other person authorized as aforesaid to pay the whole
" sum, that upon taxation of the said bill shall appear to be
" due to the said attorney or solicitor respectively, it shall
" and may be lawful for the said Lord High Chancellor, the
" said Master of the Rolls, or for any of the courts aforesaid,
" or for any judge or baron of any of the said courts respec-
" tively, and they are hereby required to refer the said bill,
" and the said attorney's or solicitor's demand thereupon,
" although no action or suit (*a*) shall be then depending in
" such court touching the same, to be taxed and settled by
" the proper officer of such court, without any money being
" brought into the said court (*b*) for that purpose; and if
" the said attorney or solicitor, or the party or parties charge-
" able by such bill respectively, having due notice, shall re-
" fuse or neglect to attend such taxation, the said officer may
" proceed to tax the said bill *ex parte* (pending which re-
" ference and taxation no action shall be commenced or pro-

And upon application of the party chargeable by such bill, and submission to pay what shall be found due upon a taxation thereof, the Chancellor, &c. to refer the same to be taxed, without any money being brought into court, &c.

(*a*) Salk. 332.

(*b*) 2 Vez. 452.

If attorney or party, having due notice, neglect to attend the taxation, the bill to be taxed *ex parte*.

and, upon the taxation, the party forthwith to pay to the attorney the sum found due on such bill,

" secuted touching the said demand) and, upon the taxation " and settlement of such bill and demand, the said party or " parties shall forthwith pay to the said attorney or solicitor " respectively, or to any person by him authorized to receive " the same, that shall be present at the said taxation, or " otherwise unto such other person or persons, or in such " other manner as the respective court aforesaid shall direct, " the whole sum that shall be found to be or remain due " thereon, which payment shall be a full discharge of the

in default thereof, such party liable to an attachment, &c.

" said bill and demand; and in default thereof the said party " or parties shall be liable to an attachment or process of " contempt, or to such other proceedings, at the election of " the said attorney or solicitor, as such party or parties was or

Attorney having been overpaid, to refund; or be liable to an attachment, &c.

" were before liable unto; and if, upon the said taxation and " settlement, it shall be found that such attorney or solicitor " shall happen to have been overpaid, then in such case the " said attorney or solicitor respectively, shall forthwith re- " fund and pay unto the party or parties entitled thereunto, " or to any person, by him, her, or them authorized to re- " ceive the same, if present at the settling thereof, or other- " wise unto such other person or persons, or in such manner " as the respective court aforesaid shall direct, all such money " as the said officer shall certify to have been so overpaid; and " in default thereof, the said attorney or solicitor respectively, " shall in like manner be liable to an attachment or process " of contempt, or to such other proceedings, at the election " of the said party or parties, as he would have been subject

Courts authorized to award costs of taxation, according to the event thereof, &c.

" unto, if this act had not been made; and the said respec- " tive courts are hereby authorized to award the costs of such " taxations to be paid by the parties, according to the event

" of the taxation of the bill (that is to say,) if the bill taxed " be less by a sixth part than the bill delivered, then the at- " torney or solicitor is to pay the costs of the taxation; but " if it shall not be less, the court in their discretion shall " charge the attorney or client, in regard to the reasonable- " ness or unreasonableness of such bills."

THE 12 *Geo.* 2. c. 13. s. 5. enacts, " That it shall and " may be lawful to and for every attorney, clerk in court, and " solicitor, to write his bill of fees, charges, and disburse- " ments, with such abbreviations as are now commonly used " in the *English* language; any thing in any former law to " the contrary notwithstanding."

Attornies may write their bills with the abbreviations commonly used. Vide Ray v. Jackson, Barnes, 121. Pract. Reg. 37.

12 *Geo.* 2. c. 13. s. 6. " And be it further enacted, that " the said act of the second year of his present majesty, for " the better regulation of attornies and solicitors, or any " clause, matter, or thing therein contained, shall not extend " to any bill of fees, charges and disbursements, that are " now, or shall hereafter become, due from any attorney or " solicitor to any other attorney or solicitor, or clerk in " court; but that every such attorney, solicitor, or clerk in " court, may use such remedies for the recovery of his fees, " charges, and disbursements against such attorney or solici- " tor, as he might have done before the making of the said " act."

The 2 G. 2. c. 23. not to extend to any bill of fees between one attorney and another.

IF in an action by an attorney, he declares specially for several fees, and for so much money laid out in prosecuting and defending several suits at law for the defendant, the latter

Brooks v. Hague, C. B. M. 30 Car. 2. Sir Tho. Raym. 245. S. C. 1 Freem. 257.

3 Salk. 19. S. P. Porter v. Sterling, 3 Keb. 104. 118. Marrow v. Billam, Ibid. 514.

may plead the 3 *Jac.* 1. c. 7. in bar, and that the plaintiff had not given him a true bill of charges, according to that statute, before the bringing of the action.

Evely v. Livermore, B. R. M. 22 Car. Al. 4. acc. Salk. 86.

But, where an attorney alleges, in his declaration, a special promise by the defendant to pay what the plaintiff should expend, the statute of 3 *Jac.* 1. is no plea.

Jordan v. Powell, B. R. 4 Jac. 2. Carth. 57. S. C. Comb. 126. 1 Show. 48. acc. Salk. 86.

Neither is it any plea to a general *insimul computasset*; because it may include other money besides fees.

1 Freem. 257. Vide 1 Show. 49. Salk. 86.

And, for the same reason, it has been said, that this statute is no plea to a general *indebitatus assumpsit*, for there it does not appear, on the face of the declaration, upon what account the action was brought.

Milner v. Crowdall, M. 3 W. and M. 1 Show. 138. 1 Freem. 257.

In an action by an attorney for fees, the defendant, having omitted to plead the statute of 3 *Jac.* 1. in bar, may give it in evidence upon the plea of the general issue, at the trial.

Brickwood v. Fanshaw, B. R. T. 2 W. and M. Carth. 147. S. C. 1 Show. 96. Salk. 86.

The 3 *Jac.* 1. does not extend to matters transacted in inferior courts, but only to suits in the courts of *Westminster-Hall*; therefore, in an action by an attorney for fees, on account of business done partly in an inferior court, and partly in this court, it was, upon demurrer, held a bad plea.

Cas. Pr. C. P. 27. 1 Barnard. K. B. 316.

It does not appear, formerly, to have been held necessary for an attorney to deliver his bill previous to the commencement of an action for his fees, but that, if he delivered a bill at any time pending the suit, it was sufficient. But as this

practice was not only contrary to the 3 *Jac.* 1. but also afforded a litigious attorney an opportunity of harassing a client with an action for fees, which, perhaps, remained unpaid merely because the defendant had received no bill or account of them, it was at length settled by the Court of Common Pleas, on great consultation, and delivered in a solemn resolution by EYRE, *Chief Justice*, that an attorney's bill must be delivered, on the 3 *Jac.* 1. c. 7. before any action brought, in order that the client may have an opportunity of looking into it, before he is put to any further expence.

Clarke v. Godfrey, C. B. T. 11 G. 1. 1 Str. 633. S. C. Cas. Pr. C. P. 27. Pract. Reg. C. P. 36.

AND before an attorney can support an action for fees, he must now *leave* the bill with his client.

As where an action was brought in the usual form, against the defendant, for business done as an attorney, but the plaintiff was nonsuited at the trial, having failed to prove a proper delivery of his bill previous to the action, in compliance with the 2 *G.* 2. *c.* 23. s. 23.

Brooks, one, &c. v. Mason, C. B. M. 30 G. 3. H. Bl. 290.

THE circumstances were, that the plaintiff had delivered the bill in due time to the defendant, who acknowledged the debt, said he would pay it, but that he did not know what to do with the bill. Upon which the plaintiff *took it back again*.

A MOTION was now made for a rule to shew cause why the nonsuit should not be set aside, and a new trial granted, on the ground that the bill, under the above circumstances, was properly delivered according to the statute. But

THE Court were of a different opinion, saying, that the bill ought to have been *left with the defendant*, as it was the intent of the statute that the client should have due time to examine the charges made by the attorney, and take advice upon them, if necessary; and, therefore, refused the rule.

Clarke, one, &c. v. Stone, P. 6 G. 2. Barnes, 36.

IN one case, which was an action by an attorney for fees, the Court, upon motion, granted a rule for the plaintiff to shew cause why the proceedings should not be stayed, till he delivered to the defendant a bill of costs.

Welland, one, &c. v. Rock, M. 7 G. 2. Barnes, 243. Vide 1 Barnard. K. B. 315.

HOWEVER, in a subsequent case, the Court, upon shewing cause, discharged a similar rule *nisi*, being of opinion, that they could not consider the commencing of an action for fees, previous to the delivery of a bill thereof, as an irregularity, because it was illegal, and against an act of parliament.—But, interlocutory judgment having been signed, and a writ of inquiry executed thereon, the Court set them aside upon payment of costs, bringing the money into court, pleading the general issue, and taking short notice of trial.

Harper, one, &c. Leech, T. 10 G. 2. Barnes, 123.

NEITHER will the Court stay proceedings in an action brought by an attorney for the recovery of a bill of costs, on the ground that such action was begun before the expiration of a month after the delivery of the bill, because, as that circumstance may be taken advantage of either in pleading, or at the trial of the cause, it is unnecessary for the court to interfere upon motion.

Spink v. Hare, *Bury* Lent Assizes, 1730.

IT was ruled at *nisi prius*, by Mr. *Justice* PAGE, that, to

support an action by an administrator upon an attorney's bill, it is unnecessary to produce any proof, at the trial, of a delivery of the bill to the defendant, before the bringing of the action.

1 Barnard. K. B. 433. Griffith v. Squire, Cas. Pr. C. P. 58.

So, in an action brought for business done by the plaintiff as an attorney in conducting a prosecution, at the quarter sessions for the defendant, Mr. *Justice* BULLER, held no such proof requisite, being of opinion, that, by the 2 *Geo.* 2. which requires an attorney to deliver his bill, it was not necessary to do so for business done at the sessions; the statute only prescribing it in case of business done in a court of record wherein attornies are admissible and sworn.

Stephenson v. Taylor, and another, *York* Summer Assizes, 1786. *cor.* Buller, J. 4 T. R. 124. n. (c.)

BUT although an attorney cannot support an action upon his bill, till a month after it has been delivered, yet it hath been holden, that that circumstance is unnecessary to entitle him to *set it off* in an action brought against him; that he must not produce it at the trial by surprise, but that it is sufficient, in such case, to deliver it time enough for the plaintiff to have it taxed before the trial.

Martin v. Winder, B. R. P. 23 G. 3. Doug. 2 ed. 199. n. [†63.]

A CLIENT cannot move, at one and the same time, that an attorney may be directed to deliver a bill, and that the same may be referred to the prothonotary to be taxed;—these are distinct motions; and he ought first to move for the delivery of a bill, and, that being done, for a taxation.

Cowper v. Milburn, T. 13 G. 2. Barnes, 126.

THE statute of 2 *Geo.* 2. does not prescribe any particular

time, for the taxation of an attorney's bill, but unless the party apply, within a reasonable time after the delivery or payment thereof, the Court will not, except under special circumstances, refer it for that purpose.

Clarke v. Taylor, P. 8 G. 2. Cas. Pr. C. P. 118 S. C. Pract. Reg. 38. Barnes, 124. Vide post. 503.

THUS where, upon motion that the plaintiff's bill of costs might be referred to be taxed, it appeared that the bill had been delivered six months before, an action brought, interlocutory judgment signed, and a writ of inquiry executed, the Court rejected the application, saying, that it came too late, the damages being already ascertained upon the inquiry.

Marsh v. Carter, M. 8 G. 2. Cas. Pr. C. P. 109. S. C. Pract. Reg. 37.

So, where a bond had been given for the amount of an attorney's bill five years before, and all the vouchers been delivered up, the Court refused a motion for referring the bill to taxation.

BUT this matter seems to rest solely in the discretion of the respective courts.

Anon. H. 32 G. 2. Say. Costs, 322.

FOR, in a case subsequent to either of the foregoing, after a warrant of attorney had been given for confessing judgment for the money due upon an attorney's bill of fees and disbursements, and after judgment had been actually entered up, the bill was directed to be taxed, and, in the mean time, execution upon the judgment to be stayed.

Bennet v. Hart, B. R. T. 1 G. 3. Say. Costs, 323.

AND in *Bennet* v. *Hart*, a rule was made for referring an

attorney's bill to be taxed, notwithstanding it had been paid five years. And, by

Vide Doug. 2 ed. 199. Imp. Pr. C. P. 3 ed. 527.

Lord Mansfield,—after the payment of an attorney's bill has been so long acquiesced under, the Court will not refer it to be taxed, unless there are some special circumstances in the case. But there are such in the present case; and wherever they do exist, neither payment, nor a release, nor a judgment for the money due, will preclude the Court from referring the bill to taxation.

So in another case, where an attorney had brought an action upon two bonds given by the defendant, three or four months before, in satisfaction of a bill of law charges, a rule was made upon the plaintiff to deliver a bill, in order that it might be referred to the master to be taxed, and, in the mean time, proceedings to be stayed.

Palmey v. Swan, B. R. P. 5 G. 2. 2 Barnard. K. B. 128. Vide 1 Barnard. K.B. 144, 5.

So, finally, in a case in Chancery, where a petition was preferred against *Meredith* the solicitor in the cause, complaining of improper and heavy charges in his bill; and of his taking a judgment of one of the parties for 400*l.* whilst the cause was depending, and before it could be known what his bill would come to.

Drapers Company v. Davis, In Canc. May, 4, 1742. 2 Atk. 295. Vide 2 Atk. 29.

Lord Hardwicke, *Chancellor*.—Notwithstanding this bill has been adjusted and allowed some time, yet the behaviour of the solicitor in taking a judgment, casts an imputation upon him, and is a practice I can by no means approve; and as it does not appear his client was assisted by any person

in the profession, in looking over and settling this bill, and as there are several very extraordinary *items*, and improper charges upon the face of it, I shall, notwithstanding the great length of time (being ever since 1725,) and notwithstanding the adjustment, and allowance, refer this bill to a master, to be taxed; and likewise order Mr. *Meredith* to be examined upon oath on interrogatories, as to the several articles of it, and do order the judgment, and other securities to be delivered up immediately.

IT does not appear to be settled, whether or not an attorney's bill, made out according to a special agreement between him and his client, is liable to taxation.

Anon. B. R. T. 5 G. 2. 2 Barnard. K. B. 164.

FOR where an action was brought by an attorney for fifty guineas, upon a special promise of the defendant, for business done in the plaintiff's profession, the Court refused a motion, that it might be referred to the master to see what was due, saying, as the action was founded upon a special agreement, they could do nothing in it.

Anon, B. R. H. 32 G. 2. Say, Costs, 321.

BUT, in a later case, in which an attorney had agreed with his client to be paid for his time at a certain rate by the day, and likewise to be allowed the expence of a post-chaise, it was holden, that the client should not be concluded by his agreement; and the bill, wherein there were charges conformable to the agreement, was referred to be taxed.

Williams v. Frith, B. R. T. 19 G. 3. Doug. 2 ed. 198.

IF an attorney's bill have been delivered a month, and no application have been made to have it referred for taxation,

the client will not (in an action brought upon it) be permitted to go into a discussion, or to question the reasonableness, of the several *items* contained in it, upon a trial at *nisi prius*, or, upon the execution of a writ of inquiry, before the sheriff.

THUS, judgment having been signed by default, and a writ of inquiry executed in an action on an attorney's bill, a motion was made for a rule to shew cause, why the verdict should not be set aside, and the bill referred to the master to be taxed. The motion was grounded on an affidavit, that the sheriff would not hear evidence to impeach the reasonableness of the charges.

Hooper v. Till, and wife, B. R. T. 19 G. 3. Ibid. 198, 9.

BULLER, *Justice*, read a note of a case, where Lord MANSFIELD, and the Court, had refused to permit a bill to be referred to the master to be taxed, because it had been read in evidence at *nisi prius*, on a notice of set off, in a cause where the attorney was defendant, which shewed that it had been delivered a month; (*a*) and they held that it was then too late to dispute the amount of the *items*. However, in the present case, a rule to shew cause was granted.

(*a*) Vide ante. 499.

CAUSE was shewn on a subsequent day.

LORD MANSFIELD.—The bill of an attorney cannot be *taxed* at the trial of an action brought upon it, nor after verdict. If there has been an account settled between the attorney and his client, the bill shall never afterwards be taxed as of course; particular cases may be pointed out; the

client may, by affidavit, shew that the business charged was never performed, or that the charges are fraudulent; but, if the business was really done, the delay of the defendant for more than a month in objecting to the *quantum*, is an admission that he thinks *that* reasonable. The rule discharged.

Richardson v. Martin, *Bury* Lent Assizes, 1732. *cor.* Page, J. 2 Barnard. K.B.233.

PROOF of the delivery of an attorney's bill, before the action was commenced, is sufficient evidence, upon a trial, at *nisi prius*, of the truth of the *items* contained in such bill, and renders it unnecessary for the plaintiff to go into any other evidence to substantiate the several particulars.

Moorhouse v. Barham, H. 23 G. 2. Barnes, 140.

THE Court will, at the instance of the defendant in a cause, order the bill of the plaintiff's attorney to be taxed, as between attorney and client, at the peril of costs.

Evans v. Bevis, M. 6 G. 2. 2 Barnard. K. B. 182. Gregg's Case, Salk. 89. contra.

IF an action be commenced in the King's Bench upon an attorney's bill, that court being thereby possessed of the cause, has a power to refer such bill for taxation, although no one *item* in it was for business transacted in *B. R.*

Ashton v. Molyneux, T. 10 G. 2. Barnes, 122.

BUT after an attorney's bill has been taxed by the proper officer of the court wherein the business was done, it cannot be taxed a second time by the officer of any other court;—thus, upon shewing cause against a rule for referring an attorney's bill to the prothonotary to be taxed, it appearing, that all the business was done in *Doncaster* court, and that the bill had been taxed by the proper officer there, the rule was discharged.

UNLESS an attorney signs his bill, it cannot be referred by the Court to be taxed, under the 2 *Geo.* 2. c. 23. Ellison v. Kirby, M. 4 G. 2. Cas. Pr. C. P. 60.

WHERE the executor or administrator of an attorney brings an action upon a bill for fees due to his testator or intestate, the Court of Common Pleas will not grant a rule for referring the bill to the prothonotary to be taxed. Griffith, administrator, v. Squire, M. 4 G. 2. Cas. Pr. C. P. 58. S. P. Lee v. Knight, M. 7 G. 2.
Ibid. —. S. C. Barnes, 119. Chapple, executor, v. Chapman, T. 10 G. 2. Barnes, 122.

AND, in another case, the same court discharged a rule, which had been obtained to shew cause why the plaintiff's bill, upon which the action was brought, should not be referred for taxation, upon the production of an affidavit that the plaintiff was dead. Christmas v. Chase, M. 7 G. 2. Barnes, 119.

THIS rule appears, formerly, to have likewise prevailed in the King's Bench; for, in *Wellis* v. *Nicholson*, it is laid down, that, in the case of an executor of an attorney, the testator's bills are not subject to taxation upon the statute of 2 *Geo.* 2. c. 23. the words thereof not extending to an executor. And the Court added, that, in a late case, it was held, that, in such case, the bill need not be signed (*a*). B. R. T. 11 and 12 G. 2. Andr. 276. Semb. acc. Salk. 89. 2 Str. 1056. B. N. P. 145. (*a*) Comb. 348.

HOWEVER, it is said, that this court will now make a rule for referring such a bill to taxation, upon the defendant's entering into the usual undertaking to pay what shall be found due thereon. Per Aston, J. 1780. Imp. Pr. K. B. 5 Ed. 482. Et vide Imp. Pr. C. P. 3 Ed. 526.

IF the *whole* of an attorney's bill be for *conveyancing* business, it cannot be taxed, for, in such case, the plaintiff must recover upon a *quantum meruit*. Hillier v. James, M. 12 G. 2. Barnes, 41. B. N. P. 145.

Green v. Hassel, B. R. T. 28 and 29 G. 2. Say. Rep. 233.

BUT if an attorney deliver two separate bills, one of which is for fees and disbursements in causes, and the other for conveyancing, the court will refer *both* bills for taxation.

AND, in the last case, that of *Dalston* v. *Hartcliffe* was cited, where the Court of Chancery ordered one bill of a solicitor for fees and disbursements in causes, and another for making conveyances to be taxed.

So, if an attorney deliver but one bill, and part of it only be for business done in court, and the rest for business of another nature, the *whole* bill may be referred to be taxed.

Anon. B. R. T. 19 G. 3. Doug. 2 ed. 299. n. [1].

THUS, upon a motion that the master might be directed to tax those articles in an attorney's bill, which related to conveyancing and parliamentary business, the rest being for the management of causes in this court, Lord MANSFIELD said, there was no doubt but the master might tax *the whole*; that he recollected a case, where the fees paid to a proctor for business done in the Ecclesiastical Court made part of the bill, and it was determined, that, as the *whole bill* had been referred to the master, he might tax that part of it.

AND the same distinction, until very lately, was generally understood to prevail with regard to the taxation of attornies bills of costs for business transacted at the quarter sessions; —for although it was holden, that, where *part* of an attorney's demand arose from the conduct of business in the Court of King's Bench, and the rest from the management of business at the quarter sessions, the *whole* bill was liable

Ex parte Williams, H. 31 G. 3. 4 T. R. 124.

to taxation, yet it was thought that the Court of King's Bench had no power to interfere to direct an attorney's bill to be taxed, where *all* the business was done in the inferior court. However, in *M.* 32 *G.* 3. Lord KENYON, *Chief Justice* said, that, on further inquiry from the officers of the Crown-office, he understood that there were several instances, in which this court had referred an attorney's bill to be taxed, though the *whole* business had been carried on at the court of quarter sessions.

Ex parte Williams, 4 T. R. 496.

BOTH the Courts of King's Bench and Common Pleas will now refer an agent's bill to an *attorney* in the country to be taxed, upon the country attorney's bringing the amount of the whole demand into court.

Anon. B. R. P. 23 G. 2. 1 Wils. 266. contra.

THUS, *Davy*, serjeant, moved that the bill of *Unwin* an attorney, agent for *Bearcroft*, should be referred to be taxed, and said, though it was not within the statute of 2 *Geo.* 2. by reason of that of 12 *Geo.* 2. yet that it might be taxed under the general jurisdiction of the court, and under 3 *Jac.* 1. c. 7. He made his motion on this general authority, without any affidavit.

Ex parte, Bearcroft, an attorney, T. 7 G. 3. C. B. Doug. 2 ed. 200, n.

THE Court having granted a rule to shew cause, NARES, on a subsequent day, opposed it's being made absolute; and observed, that the statute of 12 *Geo.* 2. provides, that 2 *Geo.* 2. shall not extend, &c. and therefore it is not necessary for an agent to deliver a bill before he brings an action; the reason of which he took to be, that it was not looked upon to be subject to taxation. The statute of 3 *Jac.* 1. requires bills

to be delivered by attornies to their *masters or clients*. They are supposed ignorant of the steps in a cause, and the due charges. The agent, he said, who does the business in town is entitled to the fees, unless there is a contrary stipulation between him and the country attorney.

THE Court was of opinion, that the bill should be taxed, and that they could order it under the general authority of the Court, that it might be seen that only due charges were made.

AFTER the Court had declared this opinion, *Barnes*, the secondary, said he remembered, before 2 *Geo.* 2. applications made to judges at their chambers, to refer agents' bills to be taxed, and that it was frequently done upon the country attorney's bringing the fees charged into court.—The rule was made absolute, but with the condition that *Bearcroft* should bring the money into court.

Dixon v. Plant, M. 19 G. 3. B. R. Doug. 2 ed. 199. n. (1).

So, in the case of *Dixon* v. *Plant*, it was moved that *Dixon*'s bill as agent in town for *Plant*, a country attorney, might be referred to the master to be taxed.

WILLES, ASHURST, and BULLER, *Justices*, (Lord MANSFIELD having left the court before the motion was made) were inclined to think that the bill was not taxable by the master, the act of 12 *Geo.* 2. c. 13. s. 6. having enacted that 2 *Geo.* 2. c. 23. s. 23. for referring attornies' bills, "should not extend to any bill due from any attorney or "solicitor, to any other attorney, solicitor, or clerk in court."

However, at the sittings at *Guildhall*, after *Michaelmas* Term, 19 *Geo.* 3. Buller, *Justice*, who that day sat for Lord Mansfield, informed the bar, that, upon inquiry, it had been found to be the practice of the Court of Common Pleas, confirmed by a case decided in that court, to make orders for the taxation of agents' bills, and he read a note of the case, *ex parte Bearcroft*, which had been lent him by Gould, *Justice*. After which, he said that, on being made acquainted with this case, he had conferred with Willes, and Ashurst, *Justices*, and that they were all three of opinion, that *Dixon*'s bill should be referred; that the practice of all the courts ought to be uniform; that questions on bills of this sort would be much better understood and settled by the master, than by a jury or judge, at *nisi prius*. Upon this, the counsel in the cause agreed, that the bill should be taxed by consent, the defendant bringing into court the sum remaining due on the amount of the plaintiff's claim, and that what should be deducted, if any thing, should be afterwards repaid to him.

If a sixth part of the amount of a bill delivered by an attorney be deducted upon it's being referred to be taxed, the 2 *Geo.* 2. c. 23. s. 23. in express terms, subjects the attorney to the payment of the costs occasioned by the taxation; but the statute gives the court a discretionary power of directing those costs to be paid either by the attorney or client, according to the reasonableness or unreasonableness of the bill, in case *less* than one-sixth part thereof be taken off upon it's taxation.

Hurst v. Dixon, M. 6 G. 2. Barnes, 118. S. C. Cas. Pr. C. P. 78. Pract. Reg. 36.

In *Hurst* v. *Dixon*, where the bill delivered amounted to 75 *l.* 15 *s.* 7 *d.* and the deductions, upon taxation, to only 7 *l.* 3 *s.* 10 *d.* it was determined that the costs of taxation should be discharged by the *client*, and not by the attorney.

Barker, Esq. v. the Bishop of London, and others, H. 28 G. 2. Barnes, 147.

So where an attorney's bill, amounting to 165 *l.* 15 *s.* was referred to one of the prothonotaries to be taxed, and less than a sixth part, *viz.* 25 *l.* 13 *s.* 10 *d.* was taken off upon the taxation, it was holden, that the costs attending the taxation should be sustained by *the client*. And by the Court,—If a sixth part of an attorney's bill be deducted, we have no discretion under the statute of 2 *Geo.* 2. but are obliged to award costs of taxation against the attorney; but where less than a sixth part is deducted, we have a discretionary power of charging either the attorney or client with those costs. The statute is a good guide; what it directs in one case, seems to be a right rule in the other. Ever since the statute, costs of taxation have been reciprocally given to the party charged, and to the attorney, as a sixth part has, or has not been taken off.

If an attorney accept, in satisfaction of a bill delivered, a less sum than what appears to be there charged, and such bill is afterwards taxed, the attorney shall not pay the costs of taxation, unless a *sixth part of the sum which he received in satisfaction* of his original demand be deducted.

Ecollier v. Dutour, T. 13 and 14 G. 2. Barnes, 128. S. C. Pract. Reg. 39.

Thus, where an attorney delivered a bill to his client amounting to 5 *l.* 4 *s.* 6 *d.* but afterwards accepted of 4 *l.* 14 *s.* 6 *d.* in full satisfaction of his demand. The bill being afterwards,

upon a taxation, reduced to 4*l.* 5*s.* 2*d.* a rule was obtained for the attorney to shew cause, why he should not pay the costs of taxation, on the ground that the bill delivered was less by a sixth part than the bill taxed. But,

THE Court considered the sum accepted by the attorney, in full of his bill, as his demand, and, as the money overpaid, was not a sixth part of that sum, they discharged the rule, upon the repayment of 9*s.* 4*d.* which had been overpaid.

BUT the executor or administrator of an attorney is not liable to costs, although a sixth part of a bill for business done by the testator or intestate be deducted upon a taxation.

THUS upon motion that the executrix of an attorney might be directed to pay the costs of taxing a bill, the circumstances were, that the intestate had delivered his bill in his lifetime, and that after his death it was referred for taxation, when above a sixth part was struck off.

Weston v. Pool, B. R. M. 10 G. 2. 2 Str. 1056. S. P. Dutton v. Agate, P. 20 G. 2. Say. Cost, 327.

THE Court rejected the motion, holding, that the words of the 2 *Geo.* 2. impose such costs upon the attorney or solicitor only; and the executrix is not to blame, if she stand upon his bill, or make out one from his books.

ALL affidavits produced, read, or made use of before any of the prothonotaries of the Common Pleas, upon the taxation of costs, must be filed in the respective prothonotary's office.

Reg. H. 11 G. 2. C. B. Vide Reg. M. 9 G. 2. B. R.

Boseville, an attorney, v. ——, T. 11 and 12 G. 2. Barnes, 126.

AND, in the following case, the Court set aside a judgment, for a non-compliance with this rule;—the plaintiff's bill of costs was referred to Sir *George Cooke* to be taxed, upon the usual submission of the defendant to pay what should be found due thereon; which not being done, the plaintiff proceeded in his action, after the taxation, and obtained judgment; but having omitted to file an affidavit, that he had made use of before Sir *George* upon the taxation, in order to augment his allowance of costs, pursuant to the late rule, the Court set the judgment aside.

Osbaldeston v. Cross, and others, In Scacc. H. 11 G. 2. Com. 612.

AFTER an attorney's bill has been taxed by the proper officer of a court of law,—as one of the prothonotaries of the Court of Common Pleas, a court of equity will not entertain cognizance of a bill filed by the attorney, suggesting that improper deductions had been made by the prothonotary upon the taxation, and praying, that the defendants, his clients, might come to a fair account with the plaintiff for the monies due to him.

NEITHER can an attorney or solicitor bring a bill in equity for his bill.

Parry v. Owen, In Canc. July 31, 1751. Ambl. 189. S. C. 3 Atk. 740.

FOR where a bill was brought in Chancery by an executrix to be paid several bills due to the testator for business done as an attorney at law, and solicitor in this court for the defendant, there was a demurrer to the relief, which shewed for cause, that the plaintiff's remedy to recover what might appear to be due to her from the defendant, touching the matters aforesaid, was, and ought to be, by suit at law, where the

said matters were properly triable and determinable, or by an application to this court in a summary way, and not by suit therein. And, on argument, Lord HARDWICKE, *Chancellor*, allowed the demurrer.

AFTER the taxation of a solicitor's bill the client cannot have an antecedent demand deducted out of what was taxed due to the solicitor upon such bill; for by applying to have the bill taxed, the party submits to pay what shall be found due thereon. And by the Lord Chancellor,—the Court is indeed to see, that solicitors do their clients justice; yet the giving way to a motion of this kind would repeal the act of parliament; [2 *Geo.* 2.] and solicitors might never come at their demands, if the Court was to say, they would open the judgment (for it is a judgment of the Court upon the client's own submission to pay what should be due,) to let in this, and have the account taken. The party, therefore, has precluded himself; for he had two methods; he might apply to tax the bill, and then must submit to pay; or, if there were accounts between them, might have brought a bill for that account, and alleged he was indebted to the solicitor, or that the solicitor pretended he was, for bill of fees and disbursements, and prayed to have that account taken: but he has waved that, knowing it to be so. And in general, accounts cannot be taken on the taxation of a bill. The Court cannot now stop the payment of it to have the account taken; that would make these things so uncertain, there would be no end of them.

Anon. In Canc. July 24, 1752. 2 Ves. 452.

NEITHER of the parties in a cause can change his attorney

7 Mod. 50. Say. Rep. 218.

2 Bl. 1323. Doug. 2 Ed. 217. vid. 2 Ves. 112. Langley v. Stapleton, T. 10 and 11 G. 2. Barnes, 40.

without first obtaining leave of the Court for that purpose; and the Court will not grant such leave until the party applying for it has actually paid, or undertaken to pay, the attorney's bill as taxed by the proper officer, especially if it appear, that such attorney has been at considerable expence and trouble, and of signal service to his client.

Comb. 43. Doug. 2 Ed. 104, 238. 2 Ves. 25. 4 T. R. 124. Vide 3 T. R. 275. 3 Atk. 727. 2 Ves. 111.

An attorney or solicitor shall not be compelled to deliver up the deeds and papers of his client till he is paid his bill of costs. In like manner, he has a lien on the money recovered by his client, for his bill of costs: if the money come to his hands, he may retain (1) to the amount of his bill. He may stop it *in transitu*, if he can lay hold of it. The practice, in this respect, is not very ancient, but it is established on general principles of justice, and courts both of law and equity have now carried it so far, that an attorney or solicitor may obtain an order to stop his client from receiving money recovered in a suit in which he has been employed for him, till his bill is paid.

Semb. Bishop v. Huggins, H. 8 G. 2. Barnes, 38.

If money recovered by an executor be paid into the hands of the attorney employed by him, he may retain out of it to the amount of his bill of costs for business done for the testator in his lifetime, as well as of that due to him on account of business transacted for the executor, subsequent to the testator's decease.

(1) In the case of *Rex* v. *Bury*, P. 19 G. 3. Doug. 2 Ed. 194. n. [26] the question was, whether a *clerk of assize* has a right to retain a record till he is paid his fees for drawing, ingrossing, &c. The matter being compromised, the Court delivered no decisive opinion upon the subject, but Lord Mansfield said he should be very unwilling to determine that a clerk of assize has a lien on the records of the court, for his fees, for that he foresaw great inconvenience from such a doctrine.

And in *Barnsley* v. *Powell* it was laid down by the Lord Chancellor, that if a solicitor prosecute to a decree, he has a lien on the estate recovered in the hands of the person recovering, for his bills; but if the client should die, the solicitor has no such lien on the estate in the hands of the heir at law, unless it should be necessary to have the suit revived, and then the lien will revive too.

In Canc. Aug. 4, 1750. Ambl. 102.

So a solicitor in consideration of his trouble, and the money in disburse for his client, has a right to be paid out of a duty decreed to an administratrix, and a lien upon it, before the bond creditors of the intestate, and this is constantly the rule of the Court of Chancery; neither can the administratrix controvert this rule, by insisting upon applying the assets in a course of administration.

Turwin v. Gibson, In Canc. July 31, 1749. 3 Atk. 720.

So solicitors are entitled to a satisfaction for their bills of costs out of the fund of the estate, in cases of lunacy or bankruptcy.

Ex parte Price, August 5, 1751. In Canc. 2 Ves. 407. Vide Ambl. 102.

If after the payment of money into court by the defendant in an action, the plaintiff proceed, and recover a verdict for a greater sum, and then become a bankrupt, the Court will order so much of the money paid into court, as will be sufficient for the purpose, to be paid to the plaintiff's attorney in satisfaction of his bill of costs, taxed by the proper officer, and the residue to the plaintiff's assignees.

Ouston v. O'Bryan, T. 27 and 28 G. 3. Barnes, 145.

So an attorney has a lien for his bill upon money levied

under an execution upon a judgment recovered by his client, and, on motion, the Court will grant a rule upon the sheriff, to pay it over to him, notwithstanding a docquet has been struck against the plaintiff, he having become a bankrupt since the judgment.

Griffin v. Eyles, Warden of the Fleet, C. B. H. 29 G. 3. H. Bl. 122.

As where the plaintiff, having, in *Michaelmas* Term last, recovered judgment against the defendant for 252 *l.* 5 *s.* 5 *d.* in an action of debt for the escape of one *Jaques* (a prisoner charged in execution at the suit of the plaintiff,) sued out a *fieri facias* directed to the sheriff of *Surrey*, who made a levy, to that amount, on the defendant's goods. Soon after, the defendant gave notice to the sheriff, to retain the money levied, stating that he should make an application to the Court to set aside the proceedings for irregularity. On the receipt of this notice, the sheriff refused to pay the money to the plaintiff's attorney, who demanded it. In consequence of which, the attorney obtained a rule to shew cause, why the sheriff should not pay to him the money in question, with interest from the time it was levied, on an affidavit, which stated, amongst other things, that the whole sum was due to him for his bill of costs, as attorney for the plaintiff; *viz.* part for the debt, for which *Jaques* was taken in execution (which was the amount of costs taxed in an action brought by *Jaques* against the present plaintiff in the Exchequer,) and the remainder for the costs taxed in the action in this court against *Eyles* for the escape of *Jaques*.

AGAINST the rule it was urged, that the sheriff had done

right in retaining the money, because a docquet had been struck against the plaintiff, who, after he recovered judgment, became a bankrupt.

But, on the authority of the cases of *Turwin* v. *Gibson*, and *Welsh* v. *Hole*, particularly of the last,

The Court, after consideration, made the rule absolute with costs, leaving out that part which respected interest for the money; and said, that the circumstance of the docquet being struck was immaterial.

It has been determined by the Court of Common Pleas, that an attorney has only such a lien upon the costs, to which his client may be entitled, as is subject to the equitable claims of the parties in the cause.

For where the plaintiff brought trespass against the defendants for breaking and entering his house, &c. and two of the defendants, *Lett* and *Bourne*, suffered judgment to go by default, and had damages assessed against them at one halfpenny each, and *Noble* went on to trial, and obtained a verdict, the Court, on an affidavit, stating that the defendants, *Lett* and *Bourne*, had acted under the authority of *Noble*, who had undertaken to pay the damages and costs, permitted the costs and damages on the judgment by default to be deducted from the costs taxed to *Noble* on the *postea*, and allowed to the plaintiff.

Schoole v. Noble, Lett, and Bourne, C.B.T. 28 G. 3. H. Bl. 23. Vide Ibid. 217.

But the King's Bench will not allow a defendant to set off

damages recovered by a judgment in a former action wherein he was plaintiff, against those recovered in a subsequent action against himself, wherein the former defendant is plaintiff, without his first undertaking to pay the costs of the plaintiff's attorney in the latter action, he having a lien upon the judgment for them.

Mitchell v. Oldfield, B.R. H. 31 G. 3. 4 T. R. 123.

THUS, the plaintiff having recovered in this action a judgment against the defendant for 182 *l.* 10 *s.* the defendant, who had also recovered in another action against this plaintiff and another, obtained a rule to shew cause why the debt and costs in the latter should not be set off against the judgment in the former action; suggesting (among other reasons) that *Mitchell* had absconded.

Lord KENYON, *Chief Justice*, said, that the attornies and solicitors of the different courts had a lien on all papers in their hands, and judgments recovered, for their costs; that in the Court of Chancery they were permitted to retain title deeds for that purpose; and he thought it right that the attorney in this case should be satisfied for his costs before the defendant was allowed to make the set off.

BULLER, *Justice*.—Though this Court have said, that they will not interfere on behalf of the attorney, and prevent the plaintiff settling his own cause without first paying the attorney's bill, yet, when the adverse party, against whom a judgment has been obtained, applies to get rid of that judgment, the Court will take care that the attorney's bill is satisfied.

THE Court made the rule absolute, on the defendant's undertaking to pay the attorney's bill, and on his entering a *remittitur* in the cause in which this defendant was plaintiff.

IF a plaintiff compromise the debt and costs with the defendant before the plaintiff's attorney has been paid, the Court will not oblige the defendant to pay him, unless he gave notice to the defendant not to settle with the plaintiff until his bill should be paid. As where,

ON a rule to shew cause, why the defendant should not pay to the plaintiff's attorney his bill of costs, the case was as follows:—In an action of assault there was a verdict for the plaintiff, damages 20 *l.* judgment and a writ of error brought. Pending the writ of error, the plaintiff personally compromised the debt with the defendant (who had lain in jail two years), and executed a release; having accepted of ten guineas for the debt and costs.

Welsh v. Hole, B. R. M. 20 G. 3. Doug. 2 Ed. 238.

LORD MANSFIELD.—If an attorney apply to the Court, they will prevent money recovered by his client from being paid over till his bill of costs is satisfied. I am inclined to go still farther, and to hold that, if the attorney gave notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned, after notice. But I think we cannot go beyond these limits. Though there may be some room to think that there was collusion here to cheat the attorney, yet, on the other hand, ten guineas may be a reasonable compensation from a man

who has lain two years in jail. Besides, this application goes to the extent of controverting the validity of a payment of the *whole* debt and costs to a plaintiff without the privity of his attorney, and it would be too much to say, that a defendant shall not transact the business of a cause with the plaintiff himself, in a case where there has been no notice not to do so from the attorney either express or implied—nothing even like saying, "I have no security for my bill," or, "I "shall never be paid unless the plaintiff recover in this "action." The rule discharged.

In the last case, the plaintiff received ten guineas in satisfaction of the judgment, and as the consideration for executing the release; this the Court thought a reasonable composition under the existing circumstances of the case, the defendant having been in confinement two years; but, perhaps, it might have been different if the release had been merely voluntary, and without any consideration.

In Canc. Oct. 22, 1750. 2 Ves. 25.

For where one *Owen* petitioned to be discharged from a contempt and custody for non-payment of costs taxed for scandal and impertinence against *F. Lister*, who had executed a release to *Owen*; which release, it was insisted, should bind *Broom*, the clerk in court, who carried on the prosecution against the petitioner:—

Lord Hardwicke, *Chancellor*, said, the clerk in court has a general lien on the duty recovered by his diligence and expence; which extends as well to collateral proceedings as to a decree. But it is objected, that the client has released it

to his adversary, and that binds his solicitor, or clerk in court; who, though they have originally a lien, on what has been recovered by their expence, diligence, and costs, yet that is not to extend to that degree as to prevent the client fairly and honestly from making an end with his adversary. I am of that opinion, provided any thing appeared to be paid. If the client had by composition, or any reasonable consideration for the costs, made an end with his adversary, I would not suffer this equity to be set up: but if a clerk in court, having this equity, shall be discharged by a mere voluntary release executed by his client and his adversary, he might be defeated by a collusion; like the case arising out of *Hertfordshire*, about a year ago, on motion. This is the distinction; the costs are not paid; no composition or consideration; but a mere voluntary release, set up to defeat the clerk in court; which might be done in any case, if the Court should suffer this. Had there been any consideration, I should have laid weight thereon; but no such appears on evidence.

As to this contempt therefore, and the attachment thereon, let the petitioner be discharged on payment to *Broom*; it appearing that *F. Lister* has executed a release.

If the executor of an attorney, who employed a clerk in the Crown-office, deliver a bill to a client of the testator, in which is included the demand of such clerk in court, the Court will, on motion, grant a rule upon the original client to pay the clerk in court his demand, and the remainder of the attorney's bill to his executor.

Waldron's case, B. R. H. 13 G. 2. 2 Str. 1126. S. P. 3 Burr. 1313.

THUS, *Ingram*, an attorney, employed Mr. *Waldron*, a clerk in the Crown-office, in several *quo warranto* causes in the borough of *Evesham*, which were prosecuted and defended by Sir *John Rusbout* and Mr. *Rudge*, who were *Ingram*'s clients. *Ingram* died insolvent; after which his executors delivered bills to Sir *John Rusbout* and Mr. *Rudge*, including the clerk in court's demand, which amounted to 292 *l.* 6 *s.* and insisted to receive the whole amount of these bills, leaving Mr. *Waldron* to come in as a creditor of *Ingram*.

UPON this it was moved, that Sir *John Rusbout* and Mr. *Rudge* (who admitted to have above 600 *l.* in their hands of *Ingram*'s bill) might pay the clerk in court his share. *Et per Curiam*,—The money paid to *Waldron* will not be assets that have come to the hands of the executors; so they cannot be prejudiced. Accordingly, a rule was made, that Mr. *Waldron* should be paid 292 *l.* 6 *s.* his proportion of the bills delivered.

AND the Court of Chancery will make a similar rule in favour of a clerk in court, where there is any money remaining due in the hands of the original client.

Farewell v. Coker, In Canc. P. 1728. 2 P. Wms. 460.

Mr. *Farewell* employed one *Bower*, of ——— in *Somersetshire*, as his solicitor in a cause in Chancery, and *Bower* the solicitor employed Mr. *Walter Edwards* as his clerk in court.

Mr. *Farewell* paid *Bower* at several times about 800 *l.*

which he alleged was more than was due to him upon his bill. Mr. *Bower*, died, and his widow administered to him; Mr. *Edwards* the clerk in Chancery's bill continued unpaid, and he delivered out several papers, copies of depositions, and orders to other solicitors for the use of *Farewell*, in order to an issue in this cause.

Mr. *Farewell*, on petition, got an order to tax *Bower*'s bill, alleging it was overpaid, upon which *Edwards* got an order *ex parte* from the Master of the Rolls, to stay the taxing of the bill and all proceedings, till his bill was paid.

On petition to the Lord *Chancellor* (King), to set aside that order, his Lordship said, the client in the country employs only the attorney or solicitor in the country, and knows nothing of the clerk in court, where it is a cause in Chancery, or of the entering clerk, where it is a cause at law; and, on the other hand, the clerk in court, or entering clerk, being (generally) perfect strangers to the country client, give credit to the attorney or solicitor in the country only; so that if the country client pays his principal, who is the country attorney or solicitor, he is thereby discharged, and must not pay the same debt twice.

All I can do for the clerk in court is, to take no paper out of his hands till paid; and if any thing be remaining due in Mr. *Farewell*'s (the country client) hands, I will stop it, and the same shall be paid to *Edwards*, the clerk in court. Also here being some proofs by affidavits of *Farewell*'s retaining *Edwards* to take care of the cause, let that be tried in an action at law to be brought by *Edwards* against *Farewell*.

CHAPTER XI.

OF COSTS IN CRIMINAL PROSECUTIONS AND PROCEEDINGS.

SECT. I.

Of Costs, upon an Indictment.

SECT. II.

Upon Complaints determined before Justices of the Peace out of Sessions.

SECT. III.

Upon Appeals to the General or Quarter Sessions of the Peace.

SECT. IV.

Upon removing Convictions, &c. by Certiorari.

SECT. V.

In an Information for a Misdemeanor.

SECT. VI.

In an Information in the Nature of a Writ of Quo Warranto.

SECT. I.

Of Costs, upon an Indictment.

By the 31 *Eliz.* c. 11. s. 3. it is enacted, "That no restitution upon any indictment of forcible entry, or holding with force, be made to any person or persons, if the person or persons so indicted hath had the occupation, or hath been in quiet possession by the space of three whole years together next before the day of such indictment so found, and his, her, or their estate or estates therein not ended or determined; which the party indicted shall and may allege for stay of restitution, and restitution to stay until that be tried, if the other will deny or traverse the same: and if the same allegation be tried against the same person or persons so indicted, then the same person or persons so indicted to pay such costs and damages to the other party, as shall be assessed by the judges or justices before whom the same shall be tried; the same costs and damages to be recovered and levied as is usual for costs and damages contained in judgments upon other actions."

No restitution to be made upon an indictment for forcible entry, if the party indicted have been in quiet possession three years, and his estate not ended; which he may allege in stay of restitution.

Costs and damages to be awarded against party indicted, if the said allegation be found against him.

The 13 *Geo.* 3. c. 78. s. 64. enacts, "That it shall and may be lawful for the court before whom any indictment or presentment shall be tried for not repairing highways, to award costs to the prosecutor, to be paid by the person or persons so indicted or presented, if it shall appear to the said court, that the defence made to such indictment or

Costs upon indictments or presentments for not repairing highways.

" presentment was frivolous; or to award costs to the person " indicted or presented, to be paid by the prosecutor, if it " shall appear to the said court that such prosecution was " vexatious."

Defendants prosecuting *certiorari's* to remove indictments from sessions, to enter into a recognizance of 20*l.* with two sureties, to appear, &c. and at his own costs to try the indictment at next assizes, or term, on notice to the prosecutor.

(*a*) By force of 8 and 9 W. 3. c. 33.

THE 5 and 6 *Will.* and *Mary*, c. 11. (made perpetual by 8 and 9 *Will.* 3. c. 33.) enacts, " That all the parties indicted, " prosecuting a *certiorari*, for the removal of any (1) in- " dictment or presentment of trespass or misdemeanor, be- " fore trial had, from a court of general or quarter sessions " of the peace, shall, before the allowance thereof, find two " sufficient manucaptors, who shall enter into a recognizance, " in the sum of twenty pounds, before one or more justices " of the peace of the county or place (or (*a*) else before one " of the judges of the King's Bench, in which case such judge " shall make mention of it under his hand, on the back of " the writ) with condition at the return of such writ to ap- " pear and plead to the said indictment or presentment in " the Court of King's Bench, and at his and their own costs " and charges to cause and procure the issue that shall be " joined upon the said indictment or presentment, or any " plea relating thereto, to be tried at the next assizes to be " held for the county wherein the said indictment or present- " ment was found, after such *certiorari* shall be returnable, " if not in the cities of *London*, *Westminster*, or county of " *Middlesex*; and if in the said cities or county, then to cause

(1) The 21 *Jac.* 1. c. 8. had before enacted that, previous to the allowance of a *certiorari* to remove an indictment of riot, forcible entry, or assault and battery, from the quarter sessions, the party indicted should be bound in 10*l.* with sureties, to pay the prosecutor his costs and damages.

" it to be tried the next term after, wherein such *certiorari* " shall be granted, or at the sitting after the said term, if the " Court of King's Bench shall not appoint any other time " for the trial thereof; and if any other time shall be ap- " pointed by the Court, then at such other time, and to give " due notice of such trial to the prosecutor, or his clerk in " court; (and also that (*a*) the party or parties prosecuting " such *certiorari*, shall appear from day to day in the said " Court of King's Bench, and not depart until he or they " shall be discharged by the said court:) and such recogni- " zance shall be certified into the said Court of King's Bench, " with the said *certiorari* and indictment, to be there filed, " and the name of the prosecutor (if he be the party grieved " or injured), or some public officer, to be endorsed on the " back of the said indictment; and if the person prosecuting " such *cetriorari*, being the defendant, shall not, before al- " lowance thereof, procure such manucaptors to be bound " in a recognizance as aforesaid; the justices of the peace " may and shall proceed to trial of the said indictment at the " said sessions, notwithstanding such writ of *certiorari* so de- " livered."

(*a*) By force of 8 and 9 W. 3. c. 33.

Such recognizances, *certioraris*, and indictments shall be filed in the King's Bench, and the name of the prosecutor (if he be the party grieved, or some public officer,) endorsed on the indictment.

5 and 6 *W.* and *M.* c. 11. s. 3. " And be it further enacted, " That if the defendant prosecuting such writ of *certiorari*, " be convicted of the offence for which he was indicted, the " Court of King's Bench shall give reasonable costs to the " prosecutor, if he be the party grieved or injured, or be a " justice of the peace, mayor, bailiff, constable, headborough, " tythingman, churchwarden, or overseer of the poor, or any " other civil officer, who shall prosecute upon the account of

If the defendant, prosecuting such *certiorari*, be convicted, the King's Bench shall award taxed costs to the prosecutor, if he be the party grieved or civil officer, &c.

"any fact committed or done, that concerned him or them, "as officer or officers, to prosecute or present, which costs "shall be taxed according to the course of the said court, "and that the prosecutor, for the recovery of such costs, "shall, within ten days, after demand made of the defendant, "and refusal of payment on oath, have an attachment granted against the defendant by the said court for such his contempt; and the said recognizance shall not be discharged "till the costs so taxed shall be paid."

And in case of refusal of payment of such costs, prosecutor shall have an attachment against the defendant.

And the like in effect is enacted by the said statute of 5 and 6 *W.* and *M.* c. 11. s. 5. concerning the removal of indictments by *certiorari* within the counties palatine of *Chester*, *Lancaster*, and *Durham*.

The Queen v. Goodenough, P. 3 Ann. 2 Ld. Raym. 1036.

An inquisition of forcible entry found before a justice of peace in the country, was removed into the Court of King's Bench by *certiorari*. And in stay of restitution, the defendant pleaded possession by three years before the indictment found, according to the above mentioned statute of 31 *Eliz.* c. 11. This plea being traversed and found for the prosecutor, the question now was concerning costs. Holt, *Chief Justice*, said, that by the 8 *Hen.* 6. immediately upon the finding the inquisition of forcible entry, the justice was to award restitution, and the defendant had no plea to it. And now the 31 *Eliz.* c. 11. had given the defendant the plea of three years quiet possession in bar of restitution; but in case the plea was found against him, it had given costs in express words. As to the statute of 5 and 6 *W.* and *M.* c. 11. he did not take the case to be within it, because the inquisi-

tion was not found at the sessions; but if it had been found at the sessions, and removed from thence by *certiorari*, the defendant must have paid costs by the statute.

If a defendant and two sureties, upon removing an indictment by *certiorari*, enter into a recognizance in a sum exceeding 20 *l.*; it is a recognizance at common law, and not within the 5 and 6 *W.* and *M.* c. 11.; so is a recognizance to remove an indictment from a court of *oyer* and *terminer*, the statute of *William* and *Mary* extending only to the cases of removal of indictments from courts of general or quarter sessions;—therefore the Court will *discharge* such common law recognizances upon the terms thereof being complied with, and *not* order them to stand as securities for the costs of the prosecutors.

As where, upon removing an indictment from a sessions of *oyer* and *terminer*, the defendant entered into a 500 *l.* recognizance to plead, go to trial, and appear on the return of the verdict. He did so, and received judgment. Upon motion, afterwards, to discharge the recognizance, it was insisted the defendant should pay costs. But it not being in 20 *l.* the sum required by the statute of 5 and 6 *W.* and *M.* c. 11. the Court held, that it was to be considered as a recognizance at common law. And precedents being searched, it was found, that costs had not been required. Here, therefore, being a performance of every thing the words extended to, the Court discharged the recognizance.

The King v. Sidney, P. 15 G. 2. 2 Str. 1165. Vide 3 Burr. 1462. Marg.

So, where the defendant and two other persons entered

Rex v. Fonseca, M. 30 G. 2. 1 Burr. 10.

into a recognizance, upon removing an indictment (which was for an assault with intent to ravish) from *Hicks's-Hall*, where it was originally found. After the defendant had been tried, convicted, and fined in the Court of King's Bench, and paid his fine, a motion was made to discharge his recognizance, it being a recognizance at common law, and all the terms of it having been complied with.

In support of the motion, it was insisted, that it was not within the statute of 5 and 6 *W.* and *M.* c. 11. being from the court of *oyer* and *terminer*, (1) not from the sessions: and this act relates only to indictments found *at the sessions*. That the *principal* was here bound, as well as the securities; whereas the statute requires only two manucaptors *without* the principal. That the sum was also different: for it was not a recognizance in 20 *l.* but in 100 *l.* The defendant, and each security 50 *l.*; therefore, for this too, it was not within the act. In proof of which was cited *Salk.* 564. *Regina* v. *Ewer*; (*a*) where a *scire facias* was brought on a recognizance taken before a judge, upon granting a *certiorari* to remove an indictment from the sessions of the peace in the sum of 40 *l.* whereas the sum prescribed by the statute is 20 *l.* And Lord *Chief Justice* Holt held this recognizance to be

(*a*) S. C. Holt, 612. 7 Mod. 10. 2 Ld. Raym. 756.

(1) The sessions at *Hicks's-Hall*, sit in *both* capacities; *viz.* of sessions of the peace, and also of *oyer* and *terminer*; and they draw up their orders with the one title, or with the other, according to the degree of the offence; (*viz.* common assaults, and offences of an inferior nature, under the title of the court of sessions; and assaults with intent to ravish, riots, &c. and offences of a high nature, under the title of a court of *oyer* and *terminer*:) and the writs of *certiorari* are directed accordingly. The present *certiorari* was directed to them as a court of *oyer* and *terminer*. 1 Burr. 11.

good at common law; but not to be a recognizance according to this statute.

THE Court looked upon the case of *Rex* v. *Sidney*, as precisely in point; and therefore made the rule for discharging the defendant's recognizance absolute. Supra. 529.

BUT if a recognizance entered into upon defendant's removing an indictment from a court of *oyer* and *terminer* become forfeited by the defendant's neglecting to proceed to trial pursuant to the condition thereof, the Court will not discharge it, till the costs taxed for the prosecutor, on account of such neglect, are paid, notwithstanding the defendant may be in custody upon an attachment for the nonpayment of those costs, and had been acquitted on the trial of the indictment.

ACCORDINGLY, on shewing cause against a rule for discharging the recognizance of the bail, the case was this— *Lyon* was indicted at *Hicks's-Hall*, for perjury, (1) and removed the indictment hither by *certiorari*; previous to the issuing whereof, he entered into a recognizance with two sureties, as usual, "to appear and plead in the next term, "and to give notice of trial, and go to trial in or at the "sittings after such next term, unless the court shall otherwise direct." But the defendant neither gave notice of trial, nor went to trial at the sittings after the then next term; and, in the subsequent term, though he did then in- Rex v. Lyon, B.R.H. 4 G. 3: 3 Burr. 1461.

(1) Indictments for perjury found at *Hicks's-Hall*, are found before the justices there as justices of *oyer* and *terminer*.

deed give notice of trial, yet, instead of going to trial, he withdrew his record. This recognizance being thus clearly and indisputably forfeited, the prosecutor moved for costs against the defendant, for not going on to trial pursuant to his notice; which costs had been actually taxed, and then regularly demanded of *Lyon*, and upon nonpayment of them by him, the prosecutor had obtained and executed an attachment against him; and he was now in custody upon this attachment for his contempt in not paying them.

But with regard to the *merits* of the prosecution, the defendant had given notice of trial in the following term, and went to trial according to such notice; and was *acquitted*.

The Court, at first, were inclined to think, that the prosecutor, having made his election to proceed against the person of the principal, and having taken his body in execution, could not, after that, take further remedy against the bail.

However, on a subsequent day, the Court held, that as the recognizance was actually forfeited, and the prosecutor had had costs taxed to him for the defendant's neglecting to go on to trial; and as he had received no satisfaction for these costs, (for the man's body being in custody, is no real satisfaction to him for the costs;) there was no reason for discharging the recognizance: for there is no pretence for persons to apply for a *favour*, without first doing *justice*. Wherefore,

Per Cur.—The rule "to shew cause why the recogni-" zance should not be discharged," was itself discharged.

THE prosecutor of an indictment, removed into *B. R.* by *certiorari* from the sessions, is not entitled to costs under the statute of *W.* and *M.* notwithstanding he was bound over by a magistrate to prosecute, unless he be either a party injured (by which is meant one who has received a real injury), or a civil officer.

THUS the defendant, having been indicted for an attempt to burn the house of one *Eston* in *York*, and for soliciting *Mason*, one of the prosecutors, to assist her in that design, removed the indictment by *certiorari* into the Court of King's Bench, and entered into a recognizance in the penalty of 20*l.* to appear and plead to the indictment, and to prosecute it to trial at her own expence; this was accordingly done, and she was convicted and fined. *Mason* and one *Glenton* were bound over to prosecute this indictment, by the mayor of *York*, to whom they had communicated the defendant's intention; and the question now was, whether, as the defendant had paid the fine, the recognizance ought to be discharged, or to stand as a security for the costs of the prosecutors, by virtue of the 5 and 6 *W.* and *M.* c. 11.?

Rex v. Ingleton, T. 19 and 20 G. 2. 1 Wils. 139. S. C. B. N. P. 333.

BY the Court.—This case is not within that act of parliament, for that extends only to officers and persons really injured, which neither *Glenton* nor *Mason*, the prosecutors, are in this case; for there was no damage done to the house, it was only intended to be done, nor is either of them an officer; and therefore they made the rule absolute for discharging the recognizance.

Rex v. Strong, B.R.M.31G.2. 1 Burr. 431.

And, in another case, it was moved, that the defendant might be at liberty (without paying any costs) to pay into court 40*s.* being the penalty for his exercising the trade of a grocer, for the space of one month, contrary to 5 *Eliz.* c. 4, and of which he had been convicted, and that thereupon the recognizance, into which he had entered on removing the indictment into this court by *certiorari* might be *discharged*. The motion was founded on the authority of *Rex* v. *French*, *P.* 24 *G.* 2. *B. R. Rex* v. *Fisher*, *T.* 24 *G.* 2. *B. R.* in which cases this was done; because by the 5 and 6 *W.* and *M.* c. 11. no costs are payable, but upon indictments brought by the party grieved, or upon prosecutions by justices, &c. or other civil officers, prosecuting as such. So in *Rex* v. *Mary Ingleton*, *M.* 20 *G.* 2. *B. R.* Rule absolute.

Supra.

And, although the prosecutor of an indictment be one of the officers enumerated in the third section of the statute of 5 and 6 *W.* and *M.* as, for instance, a justice of the peace, if he do not prosecute *ex officio*, in the capacity of a magistrate, but only like any other individual, he shall not have costs.

The King v. Sharpness, B. R. T. 27 G. 3. 2 T. R. 47.

Thus, upon shewing cause against a rule which had been obtained to discharge the defendant out of custody as to an attachment for nonpayment of costs, the term of imprisonment for his offence being expired, the circumstances were, that the prosecutor, Mr. *Pembroke*, being a justice of the peace, had indicted the defendant, who was the keeper of the gaol at *St. Albans*, for suffering a prisoner to escape, who had been committed by him (the prosecutor) for felony; upon

which indictment the defendant had been convicted. It was contended that the prosecutor was entitled to his costs under 5 and 6 *W.* and *M.* c. 11. s. 3. as being a public officer prosecuting for the benefit of the public. And *Rex* v. *Smith* was cited, where Lord MANSFIELD said, it was enough if the prosecutor was proved to be a civil officer, to entitle him to his costs.

ASHURST, *Justice.*—On looking into this act of parliament, it appears to me, that the defendant ought not to be charged with costs. This is not one of those instances mentioned in the third section of the act, which only extends to those officers, who prosecute or present *ex officio*, or where the prosecution is carried on by the party grieved. If a justice were to present a road, and that presentment were afterwards turned into an indictment, there the justice would be entitled to costs; or if a justice were to indict a constable or other inferior officer for disobeying his order, in such case also he would be entitled to his costs. But this is not a prosecution carried on by the prosecutor as a magistrate, for any other person might have indicted the defendant: the offence in this case, was such as concerned the general justice of the realm.

BULLER, *Justice.*—From a review of all the cases in a MS. note book, it appears, that the prosecutor is not entitled to his costs. This book does not indeed include a case from *Basingstoke*, which came before this court a few years ago; but there I understand that the prosecution was carried on by the clerk of the peace, whose duty it was to draw up all pre-

sentments of constables in the form of indictments; and it was there determined, that the prosecutor was entitled to costs. But here I cannot say, that it was the duty of the prosecutor, as a justice of the peace, to prosecute this defendant. The case originally came before him in the character of a magistrate on the complaint of some other person; and if the justice chose to take the prosecution out of private hands, and conduct it himself, he cannot be said to prosecute as a magistrate, but like any other individual. The Court has always construed this act of parliament as strictly as possible. There was one case, indeed, on this statute, the law of which I doubt, where it was held, that a person, who was injured and was really the prosecutrix, was not entitled to costs, because her name did not appear on the indictment, though it was well known she was the real prosecutrix; (1) but I believe that case has been since over-ruled. Another case, afterwards, came before this court, where the question was, whether the prosecutor was entitled to the costs of a trial at bar? and it was determined, that he was not, because the statute only extended to small offences. (2) These cases shew that the Court has always put a strict construction on this act of parliament. Rule absolute.

But it should seem that the not endorsing the prosecutor's name upon the indictment does not affect his title to costs, provided it be proved that he is a person compre-

(1) *Rex* v. *Goter*, M. 16 G. 3. the prosecutrix was Lady *Cowper*, who indicted the defendant for a public nuisance.

(2) This appears from some MSS. notes of Sir *Simon Harcourt*, when he was master of the Crown-office; and which was the same book to which Mr. *Justice* Buller referred.

hended within the third section of the statute of 5 and 6 *W.* and *M.* In *Rex* v. *Smith*, it was resolved, that the prosecutor should have costs, it being proved, by affidavit, that, in point of fact, he was a civil officer, although his name was not endorsed as such upon the indictment. Indeed Mr. *Justice* BULLER, in the *King* v. *Sharpness*, mentioned a case, (*a*) where the contrary was determined; however, he not only expressed his dissatisfaction with that resolution, but added, that he believed it had been since over-ruled.

(*a*) Rex v. Goter, M. 16 G. 3.

THE case of *Rex* v. *Smith* was as follows:—an indictment for a nuisance had been removed, by *certiorari*, from the quarter sessions in *Devonshire*, into this court, by the defendant. The indictment was afterwards tried, and the defendant found guilty. He next moved in arrest of judgment, but his objections were over-ruled. After which the prosecutor obtained a rule to shew cause, why he should not have his costs, as taxed by the master of the Crown-office, before the defendant's recognizance was discharged.

Rex v. Joseph Smith, B. R. M. 30 G. 2. 1 Burr. 54.

AGAINST this rule, it was shewn for cause, that no name of any person, as being either the party injured, or a public civil officer, was endorsed upon the indictment, according to the directions of the 5 and 6 *W.* and *M.* c. 11. s. 2. and 3, without which, it was insisted, no costs were payable to the prosecutors.

ON the other side, it was acknowledged, that there was no name endorsed, but an affidavit was produced, "that the prosecutor *was* a civil officer," &c. which, it was said, was

sufficient, because the words of the 3d sect. of the act are that, "*if he be so*, the recognizance shall not be discharged, till "the costs shall be paid." But the act does not say, "that "the prosecutor shall *not* have costs, *unless* his name be "endorsed."

LORD MANSFIELD.—It is enough if it be proved, that the prosecutor was a civil officer, &c. And here it is proved by affidavit, which is sufficient.

RULE made absolute for the prosecutor's having his costs, before the recognizance should be discharged.

The Queen v. Summers, B. R. P. 1 Ann. 1 Salk. 55. 3 Salk. 104. S. P. The King v. Wallace, M. 14 G. 3.

WHEN a defendant removes an indictment from a court of general quarter sessions, by *certiorari*, into the Court of King's Bench, and is afterwards convicted, the master of the Crown-office, as hath been resolved, in taxing the prosecutor's costs, under the 5 and 6 *W.* and *M.* c. 11, ought only to consider those which were incurred *subsequent* to the *certiorari*.

1 Keb. 487. 2 Hawk. P. C. 6 Ed. 301.

THE Court of King's Bench, having the king's privy seal for that purpose, may give the third part of the fine, imposed upon a defendant after conviction upon an indictment in that court, to the prosecutor, by way of reimbursing him the costs of the prosecution. But if the prosecutor of an indictment has received a third part of the fine, and then applies for his costs under the recognizance entered into by the defendant, pursuant to the 5 and 6 *W.* and *M.* upon removing the indictment by *certiorari*, the court will order

what he has received to be deducted from the amount of the taxation.

THUS the defendant, having entered into the recognizance prescribed by that statute, removed this indictment into the Court of King's Bench by writ of *certiorari*. He was convicted, and fined fifty pounds, a third part whereof was given to the prosecutor, by an order of two judges, pursuant to the privy seal.

Rex v. Osborne, B. R. T. 7 G. 3. 4 Burr. 2125. Vide 1 Salk. 55. 3 Salk. 104. 2 Ld. Raym. 854.

A MOTION was now made for the direction of the Court to the master of the Crown-office, to tax the prosecutor's costs under the recognizance entered into upon the *certiorari*, over and above the one-third of the fine, which he had already received.

BUT the Court were of opinion, that the prosecutor could not have *both* these advantages; namely, the costs under the recognizance, and also the one-third of the fine. They, therefore, made a rule, that the master should tax the costs upon the recognizance, according to the direction of the act of parliament; and that so much as the prosecutor had received for the one-third of the fine should be deducted out of the sum allowed.

UNTIL the ten days have fully elapsed after a demand of costs taxed under a recognizance taken by virtue of this act, an attachment cannot be granted against the party refusing to pay them.

ACCORDINGLY on granting a *certiorari* to remove into

The King v. Ireland, B. R.

M. 30 G. 3. 3 T. R. 512.

this court an indictment against another person for a misdemeanor, the defendant entered into a recognizance in 20*l.* for the costs, &c. under the 5 and 6 *W.* and *M.* c. 11. s. 3. After conviction of the principal, a demand was made on the defendant for the costs; and the question arose on the words of the third section of that act, which are, "that the prose-"cutor, for the recovery of such costs, shall, *within ten days* "after demand made of the defendant, and refusal of pay-"ment, have an attachment granted against the defendant." In the present case, only *eight days* had elapsed since the demand, which, it was urged, was sufficient to entitle the prosecutor to an attachment, as the act says he shall be entitled to it *within* ten days after demand. But

THE Court said, that though the words of the statute were "*within* ten days," they had always been understood to mean, that the ten days must elapse before the attachment could be granted; otherwise, instead of the indulgence of the ten days supposed to be offered by the legislature, the party would be liable to an attachment *immediately* after a demand and refusal. And they refused the attachment.

AND if a person be in custody upon an attachment for nonpayment of costs under this statute, he is entitled to be discharged under the Lords' act, 32 *Geo.* 2. c. 28. s. 13. an attachment for nonpayment of costs, being in the nature of an *execution* in a *civil* suit.

Rex v. Stokes, B.R.T. 14G.3. Cowp. 136.

THUS the defendant, having been convicted of an assault, was sentenced to four months imprisonment; upon the expiration of which, he was continued in custody on an attach-

ment for nonpayment of costs, taxed pursuant to a recognizance entered into by him on his removal of the indictment from the quarter sessions.

On a motion for the defendant's discharge under the 32 *Geo.* 2. c. 28. s. 13. commonly called the Lords' act, it was objected, that this statute does not relate to costs accrued in *criminal* cases.

The Court inclined to think this case was not within the act, and the defendant was remanded.—But the next day Mr. *Justice* Aston asked the prisoner's counsel if he knew of any case where a person had been discharged out of custody on the Lords' act, upon an attachment on a *civil* suit; and mentioned the case of *Rex* v. *Stokes*, *M.* 23 *G.* 2. *B. R.* which was an application by the defendant, who was in custody upon an attachment for a rescous upon an execution, to be discharged under the act of *indemnity*, 20 *Geo.* 2. c. 52. Upon shewing cause it was objected, that the statute in sect. 26. contained an exception as to all persons guilty of *contempts*. But Lee, *Chief Justice*, there said, "it was not a "contempt within the provision of that section, the con- "tempts there excepted being confined to cases where the "rights of the subject only are concerned, and therefore the "Court held, that the defendant was entitled to his dis- "charge."—The contempts so excepted by that act are, in cases of prosecutions in the name of the crown, at the charge of a private party, and the words of exception are, "unless "the defendant in such prosecution shall pay to such private "prosecutor, his executor or administrator, such costs as the

"court, where, &c. shall award to be paid." Now, the words of 5 and 6 *W.* and *M.* c. 11. s. 3. are in substance the same as those of the statute of 20 *Geo.* 2. c. 52. s. 26. namely,—"that the Court of King's Bench shall, on conviction, give reasonable costs to the *party injured*, &c. who "shall *prosecute*, &c. which costs shall be taxed according to "the course of the court:" and therefore in respect of costs, it appears to me, that these are in like manner rights of the subject, with which the crown under a general act of grace could not interfere. If so, I incline to think that this is as much a civil suit as the cases excepted under 20 *Geo.* 2. c. 52. and it would be a very hard case, if the defendant could not be discharged under the Lords' act, nor under a general act of pardon; for then he must be remediless.—It was adjourned, that precedents might be searched into.

On a subsequent day, in favour of the discharge, was cited a case from 5 *Vin. Abr.* Tit. *Contempt*, (D) pl. 10. *Backtram* v. *Dennet*, where the court held, that an attachment after a decree for dismission is in nature of an execution at law, and a general pardon may pardon the *contempt*, but not the *debt*.

Vide 2 T. R. 266. 4 T. R. 316. 810.

Aston, *Justice*—(Lord Mansfield being gone). An attachment is an execution in a civil suit, and I apprehend it has long since been settled to be so. In the present case, the contempt has no relation to the offence committed by the defendant, which, as far as public justice is concerned, has been sufficiently purged by the imprisonment he has suffered: but it arises upon an act of parliament, 5 and 6 *W.* and *M.*

s. 11. which directs "the costs in these cases to be taxed by "the master, and, unless paid in ten days, an attachment to "issue." This stage of the cause, therefore, is merely of a *civil* nature; and a matter solely between *party* and *party* unconnected with the *offence* itself. It seems that no case in point has been found: but the statute of 9 *G.* 3. c. 26. for the relief of insolvent debtors, is, in my opinion, a legislative recognition that they shall have the benefit in such cases. This last act is, indeed, temporary; but the Lords' act is perpetual; and they are *in pari materiâ*; and, therefore, as the attachment is an execution for the *debt* to the *party*, whether the costs are taxed by the master of the Crown-office, or on the civil side, the defendant is equally entitled to his discharge. If not, the consequence must be imprisonment for life: for a general pardon would not extend to him, as was agreed in the case of *Rex* v. *Stokes*, *M.* 23 *G.* 2.

WILLES, *Justice*.—These statutes, which are made in favour of the liberty of the subject, ought always to receive a liberal construction. This is in all respects as a *civil debt*; and does not differ from the case of other *civil demands*. It seems to me that the stat. of 9 *Geo.* 3. c. 26. meant to extend the benefit to insolvent debtors in the fullest manner; and I am the more inclined to adopt a liberal construction in this case, as the defendant, who is a *minor*, may otherwise lie in gaol for life.

ASHURST, *Justice*.—I am of opinion that this case may be fairly included under the words "debtor and creditor" in the Lords' act; and therefore think the defendant ought to be discharged, especially, as otherwise he must be without

remedy;—because the king cannot by a general pardon release a *civil* debt, and no other alternative is open. Rule made absolute.

On taxation, costs become a debt vested; therefore it hath been determined, that, under the statute of 5 and 6 *W.* and *M.* the personal representatives of the prosecutor of an indictment are entitled to the costs taxed during his life, although no personal demand was ever made by him. However, in such case, the court will not grant an attachment against the defendant for nonpayment, but make a rule for estreating his recognizance.

The King v. Robert Chamberlayne, B.R. H. 26 G. 3. 1 T. R. 103.

Thus upon shewing cause against a rule which had been obtained, that the defendant's recognizance might be discharged, the facts appeared to be, that the defendant having been indicted at the general sessions of the peace for the city of *London*, for an assault, the indictment was removed into this court by *certiorari*; and, on the trial, the defendant was found guilty, and afterwards sentenced to pay 6*s.* 8*d.*; which he paid. The prosecutor is since dead, and no person hath administered to his estate and effects. And no demand having been made by the prosecutor in his lifetime for the costs, this motion was made upon the supposition that they never could be demanded now; the words of the statute 5 and 6 *W.* and *M.* c. 11. s. 3. being "that the "prosecutor for the recovery of such costs shall, within ten "days after demand made of the defendant, and refusal of "payment, on oath, have an attachment granted against the "said defendant." On this statute the prosecutor may move

for an attachment for nonpayment of costs, after a demand by him made, but that could not be done in this case for want of a personal demand.

It was now contended against the rule, that the recognizance should not be discharged, because either the attorney has a lien on it for his fees; or if the Court should determine that he is not entitled to it, the executors or administrators of the prosecutor ought to have the advantage of it; for the costs were taxed in the lifetime of the prosecutor.

The Court considered these costs as a *debt*, actually *vested*; —and discharged the rule.

On a subsequent day (administration having been granted of the prosecutor's effects) it was moved that the defendant's recognizance might be estreated, to entitle the personal representatives of the prosecutor to the costs.

Buller, *Justice*.—When the costs are taxed, they become a debt: and the demand, which must be made under this act of parliament, is only as to the remedy. The remedy given is by attachment: and to bring a party into contempt, he must come within the letter of the law; therefore, there must have been a demand of ten days on the defendant, before an attachment could have gone against him. But here the costs were taxed in the lifetime of the prosecutor; they became a debt vested, and will go to his personal representatives.

Per Curiam.—Rule absolute.

Rex v. Edwards, B. R. H. 8 W. 3. Comb. 419. Salk. 193.

IT is laid down in one case, that the prosecutor of an indictment shall pay costs for not proceeding to trial pursuant to notice.

Rex v. Rossiter, B. R. T. 1 G. 3. Say. Costs, 270.

BUT this doctrine is said to have been over-ruled in a subsequent case, where it was holden, that costs are not payable by the prosecutor of an indictment, notwithstanding he neglect to go on to trial according to notice given for that purpose.

Comb. 225. 2 Kely. 103. 2 Str. 946. 1049.

BUT the defendant or person indicted is liable to pay costs, if, after giving notice of trial, he do not proceed in pursuance thereof.

IT hath been determined, however, that costs for not going on to trial are not payable by the party indicted, where a full special jury (moved for by himself) do not appear, and neither party pray a *tales*, although the defendant had a warrant for a *tales* in court.

Rex v. Lowfield, B. R. T. 5 G. 2. 2 Str. 937. S.C. 2 Kely. 69.

FOR where, upon shewing cause against a rule for the defendant to pay costs for not going on to trial, the circumstances were, that the defendant, after having, upon application to the court, obtained a rule for a special jury, and likewise procured a warrant from the Attorney-General for a *tales*, in case there should be a defect of jurors, made up the record and carried it down for trial. That eleven only of the special jury appeared; and the counsel for the prosecutor would not pray a *tales*, though the warrant was given them; and that the defendant's counsel not praying one, the cause was made a *remanet pro defectu juratorum*.

THE Court held, that the defendant should pay no costs, he having, by carrying down the record, and producing the warrant for a *tales*, done all that was necessary to put the prosecutor in a capacity to try the cause, if he would. Rule discharged.

THIS likewise was a rule calling upon the defendant to shew cause, why he should not pay costs to the prosecutor for not proceeding to trial in pursuance of his (defendant's) notice given for that purpose. Rex v. Righton, Esq. B. R. P. 5 G. 3. 3 Burr. 1695.

IT was an indictment for refusing to take upon himself the office of borsholder: which indictment the defendant had removed by *certiorari*; and thereupon had (of course) entered into a recognizance to appear, plead, and try it at the next assizes. The defendant had obtained a rule for a special jury, and every thing was ready for trial; but only five of the special jury appeared, and neither side prayed a *tales*;—(though the defendant had a warrant for a *tales* in his pocket.)

THE question was, whether, under these circumstances, the defendant was obliged to pay costs for not going on to trial?

THE Court were unanimously of opinion, that the defendant had not been guilty of such a default as could render him liable to pay costs for not going on to trial. The prosecutor might have come prepared with a warrant for a *tales*, if he had thought proper. Rule discharged.

Rex v. Moor, B. R. H. 6 G. 2. 2 Str. 946. S. C. 2 Kely. 103. S. P. Rex v. Gale, B. R. H. 1 G. 3. Vide 3 Burr. 1468. 1 Bl. 460.

THE defendant having removed an indictment for perjury, into the King's Bench, and paid costs for not proceeding to trial conformably to notice, the Court refused a motion on behalf of the prosecutor to quash his own indictment, unless he would consent to pay the defendant his costs.

IT is a certain principle that the king himself neither pays nor receives costs in any case; and, as an indictment is an accusation of one or more persons of an offence, which the public good requires should be punished, it is deemed the king's suit merely, and carried on in his name, but at the instance of any private individual; therefore, no costs are payable to or by either the prosecutor or defendant, unless by virtue of some act of parliament.

2 Hawk. P. C. 6 Ed. 301.

BUT it is the common practice of the Court of King's Bench, to induce persons, who have been convicted upon indictments, to make some satisfaction, to prosecutors for the costs of the prosecution, and also for the damages sustained by the injury, whereof the defendants are convicted, by intimating an inclination, on that account, to mitigate the fine due to the king.

Cro. Circ. Comp. 6 Ed. 45.

So, after a defendant has been convicted upon an indictment for trespass and assault, or any other injury of a private nature at the sessions, the Court frequently recommend the defendant to make the prosecutor some pecuniary reparation for the injury, which, if he consent to, and the prosecuto acknowledge himself satisfied, a small fine only will be imposed upon the defendant. And sometimes, in prosecution

at the sessions, the prosecutor and defendant agree before the defendant has pleaded to the indictment, in which case, the defendant pleads guilty, and, upon proving (by an affidavit of one of the subscribing witnesses, which must be filed) a general release executed by the prosecutor, the Court will set a trifling fine. Or, if the defendant have pleaded to the indictment not guilty, and, afterwards, obtain a general release from the prosecutor, he may come into court, and, upon relinquishing his former plea, pleading guilty, and proving the release as above, on motion of counsel, a small fine will be set by the Court.

The Court of King's Bench appear, formerly, to have made a distinction between prosecutions for offences of a private, and such as were for offences of a public nature. After a conviction upon an indictment for an offence of the former description, as for an assault and battery, the Court, although the defendant refused to go before the master for the purpose of settling a compensation to the prosecutor for the injury, and his costs, would never set a greater fine than was proportionate to the injury, merely to indemnify the prosecutor his expences, by a third part of such fine,—because, in such case, an action might have been maintained. But where a defendant, after being convicted on an indictment for an offence of a public nature, refused to go before the master, the Court would have imposed a very heavy fine, in order that a third part thereof might be sufficient to reimburse the prosecutor the whole, or at least a considerable part of his costs. And, accordingly, in several instances of convictions upon indictments for public nuisances, notwithstanding the

The King v. Tew, B. R. H. 28 G. 2. Say. Rep. 195. Vide Say. Rep. 230.

The King v. Goodman, B. R. H. 25 G. 2. Say. Rep. 19.

S.P. The King v. Haddock, H. 12 G. 2. The King v. Dyke, T. 21 G. 2. cited ibid. vide etiam Fort. 254.

nuisances had been abated, the Court refused to set small fines, unless the defendants would consent to go before the master.

T. 28 and 29 G. 2. Say. Rep. 231.

But subsequent resolutions, it should seem, have overruled this distinction. In *Rex* v. *Nicholls*, after delivering the judgment of the Court, Ryder, *Chief Justice*, added, that they desired to have it understood, that, whatever might have been theretofore done, the Court would not for the time to come set a larger fine in any case of a conviction upon an indictment, than the nature of the offence required, although the person convicted should refuse to go before the master.

The King v. Warren, T. 29 and 30 G. 2. Say. Costs, 279. S. P. The King v. Bradshaw, T. 29 and 30 G. 2. Ibid. 280.

And conformably to this opinion in another case, where the defendant had been convicted upon an indictment for a public nuisance, but which was abated after the conviction, a fine of no more than six shillings and eight-pence was set;—and Lord Mansfield observed, the nuisance being abated, it is by no means proper to set a large fine, although the defendant has refused to go before the master.

The King v. Inhabitants of Chelsea, T. 33 G. 2. Say. Costs, 270.

This was an indictment for not repairing an highway, and the defendants, after pleading, not guilty, moved upon a certificate of two justices of the peace, that the way had, since the finding of the indictment, been put into repair, for leave to withdraw their plea, and to plead guilty, and to submit to a small fine.—The Court would not grant the motion, unless the defendants would consent to pay the prosecutor his costs, as between attorney and client; which being agreed to, a small fine was set.

BUT in this case, which was an indictment for not repairing a road, and motion to submit to a small fine, on a certificate that the road was now in repair, upon its being insisted for the prosecutors, that the defendants should pay the costs of the prosecution, before they should be at liberty to make such submission, the Court said, that that was contrary to their practice; and therefore set a fine of only six shillings and eight-pence.

The King v. Inhabitants of Cheshunt, B. R. T. 1 G. 3. 1 Bl. 295.

IN the *King* v. *Wingfield*, the defendant being indicted for not repairing a road *ratione tenuræ*, applied to the Court, for leave to plead guilty, and submit to a small fine, on a certificate that the road was repaired. This being denied, he pleaded not guilty, and the indictment went to trial, when the defendant was convicted; it appearing, that, at the time of the presentment and subsequent application to the Court, the road was out of repair, but was repaired before the trial. And now it was moved, that the defendant might submit to a small fine, without payment of the prosecutor's costs; on the authority of the *King* and *Chesbunt*. But the Court, on the circumstances of the case, refused to set a small fine, unless the defendant paid the prosecutor's costs subsequent to the prior application.

The King v. Wingfield, B. R. T. 6 G. 3. 1 Bl. 602.

SECT. II.

Of Costs, on Complaints determined before Justices of the Peace out of Sessions.

By the 18 *Geo.* 3. c. 19. s. 1, reciting that by the laws now in being, his majesty's justices of the peace are not sufficiently authorized on complaints that come before them out of sessions, to award costs against either the person complaining, or the person against whom any complaint is made,—it is enacted,

Justices, on complaints before them out of sessions, empowered to award costs.

"That where any complaint shall be made before any of his "majesty's justices of the peace for any county, riding, divi- "sion, city, town corporate, franchise, or liberty, and any "warrant or summons shall issue in consequence of such "complaint, it shall be lawful for any justice or justices of "the peace, who shall have heard and determined the matter "of the said complaint, to award such costs to be paid by "either of the parties, and in manner and form as to him "or them shall seem fit, to the party injured: and in case the "person so ordered by the said justice or justices to pay such "sums of money as aforesaid, shall not forthwith pay down, "or give security for the same to the satisfaction of the "justice or justices, it shall be lawful for the said justice or "justices, by warrant under his hand and seal, or their hands "and seals, to levy the same by distress and sale of the goods "and chattels of such person so refusing or neglecting: and "where goods and chattels of such person cannot be found, "to commit such person to the house of correction for the

If not paid, or secured to be paid, same may be levied by distress; if no distress, person to be committed to the house of correction.

" place where such person shall reside, there to be kept to " hard labour for any time not exceeding one month, nor " less than ten days, or until such sum or sums of money, " together with the expences, attending the commitment of " such person to such house of correction, be first paid."

If penalty amount to five pounds, costs shall be deducted thereout, so that the deduction do not exceed one-fifth of penalty.

18 *Geo.* 3. c. 19. s. 2. " Provided nevertheless, that upon " the conviction of any person or persons upon any penal " statute or statutes, where the penalty or penalties shall " amount to or exceed the sum of five pounds, the said costs " shall be deducted by the said justice or justices, according " to his or their discretion, out of the said penalty or penalties, " so that the said deduction shall not exceed one-fifth part of " the said penalty or penalties; and the remainder of the " said penalty or penalties shall be paid to, or divided among, " the person or persons who would have been entitled to the " whole of the penalty or penalties in case this act had not " been made."

Quarter sessions to make regulations for allowance of costs, &c. which are to be binding, after having received the approbation of one or more of the judges of assize, &c.

18 *Geo.* 3. c. 19. s. 9. " It shall be lawful for the justices " in quarter sessions assembled, to lay down or alter, from " time to time, such rules and regulations, as to any costs or " charges thereafter to be allowed to any person, by virtue of " any part of this act, as to them shall seem most just and " reasonable: which rules and regulations, having received " the approbation and signature of one or more of his ma- " jesty's justices of *oyer* and *terminer*, or general gaol deli- " very, at the assizes for the county, shall be binding, and " not otherwise, on all persons whatsoever: and no person " whatsoever shall be allowed any greater sum of money, by

" virtue of this act, than according to the said rules and re
" gulations so approved of as aforesaid."

SECT. III.

Of Costs, on Appeals to the General or Quarter Sessions of the Peace.

THE 8 and 9 *W.* 3. c. 30. s. 3. for the more effectual preventing of vexatious removals, and frivolous appeals, enacts,

Justices at sessions, on appeal to them concerning the settlement of any poor person, to award costs to the party prevailing thereon.

" That the justices of the peace of any county or riding, in
" their general or quarter sessions of the peace, upon any ap-
" peal before them there to be had, for and concerning the
" settlement of any poor person, or upon any proof before
" them there to be made, of notice of any such appeal to
" have been given by the proper officer to the churchwardens
" or overseers of the poor of any parish or place (though
" they did not afterwards prosecute such appeal) shall, at the
" same quarter sessions, award and order to the party for
" whom, and in whose behalf, such appeal shall be deter-
" mined, or to whom such notice did appear to have been
" given, as aforesaid, such costs and charges in the law, as by
" the said justices in their discretion shall be thought most
" reasonable and just, to be paid by the churchwardens, over-
" seers of the poor, or any other person, against whom such
" appeal shall be determined, or by the person that did give
" such notice as aforesaid: and if the person ordered to pay
" such costs shall happen to live in any county, riding, city,
" or town corporate, or elsewhere, out of the jurisdiction of

If party, liable to pay such costs, live out of the county, any justice where such

" the said court, it shall be lawful for any justice of the peace " of the county, riding, city, liberty, or town corporate, " wherein such person shall inhabit, and every such justice " is hereby required, upon request to him for that purpose to " be made, and a true copy of the order for the payment of " such costs produced, and proved by some credible witness " upon oath, by warrant under his hand and seal, to cause " the money mentioned in that order to be levied by distress " and sale of the goods of the person that is ordered and " ought to pay the same; and if no such distress can or may " be had, to commit such person to the common gaol of that " county or liberty, there to remain for the space of twenty " days."

party resides, upon request and production of the order of sessions, may levy same by distress, &c.

If no distress, party to be committed to gaol for 20 days.

By 17 *Geo.* 2. c. 38. s. 4. it is enacted, " That in case any " person or persons shall find him, her, or themselves ag- " grieved by any rate or assessment made for the relief of the " poor, or shall have any material objection to any person " or persons being put on, or left out of such rate or assess- " ment, or to the sum charged on any person or persons " therein, or shall have any material objection to such ac- " count as aforesaid, or any part thereof, or shall find " him, her, or themselves aggrieved by any neglect, act, or " thing done or omitted by the churchwardens and overseers " of the poor, or by any of his majesty's justices of the peace; " it shall be lawful for such person or persons, in any of the " cases aforesaid, giving reasonable notice to the church- " wardens or overseers of the poor of the parish, township, " or place, to appeal to the next general or quarter sessions " of the peace for the county, riding, division, corporation,

Persons aggrieved by the poor rates, &c. may appeal to the sessions,

who are authorized and required to receive and determine such appeal; and may award costs to the party succeeding thereon, as is directed by the 8 and 9 W. 3. c. 30.

" or franchise where such parish, &c. lies; and the justices " of the peace there assembled are hereby authorized and re- " quired to receive such appeal, and to hear and finally de- " termine the same; but if it shall appear to the said justices " that reasonable notice was not given, then they shall " adjourn the said appeal to the next quarter sessions, and " then and there finally hear and determine the same; and " the said justices may award and order to the party, for " whom such appeal shall be determined, reasonable costs, " in the same manner that they are empowered to do in case " of appeals concerning the settlements of poor persons by " an act made in the eighth and ninth years of King *William* " the Third."

And by the 80. *sect.* of the 13 *Geo.* 3. c. 78. (an act, for reducing into one act of parliament, the statutes for the amendment and preservation of the public highways in *England*) persons aggrieved by any thing done in the execution of that statute, and for which no particular mode of relief is therein appointed, may appeal to the general quarter sessions; —such appellant giving notice in writing of such appeal, and of the matter thereof, to the person against whom such complaint shall be made, within six days after the cause of complaint arose, and within four days after such notice, entering into a recognizance before a justice, with one sufficient surety, conditioned to try his appeal at, and abide the order of, and pay such costs as shall be awarded by, the quarter session. And the session upon due proof of such notice and recognizance, shall hear and finally determine such appeal in a summary way, and award costs to the party appealing or ap-

pealed against; to be levied and recovered (under *sect.* 72.) by distress and sale of the goods of the person ordered to pay the same, by warrant under the hand and seal of some justice within the limit where such order was made; if no distress can be found, and such costs be not forthwith paid, the party, liable to pay the same, may be committed to gaol, or to the house of correction, for any time not exceeding three months, unless the costs shall be sooner paid.

In case the party liable to pay the costs live in another jurisdiction, this clause contains the same provisions, as the 8 and 9 W. 3. c. 30. s. 3. supra. 554.

And the 13 *Geo.* 3. c. 84. (the general turnpike-act) contains similar provisions with regard to appeals to the sessions, by persons aggrieved by any thing done in pursuance of that act. 13 G. 3. c. 84. s. 76. 82.

So, by the 18 *Geo.* 3. c. 19. s. 5. (an act, *inter alia*, for the payment of the charges of constables in certain cases,) if the overseers of the poor of any place find that such place is aggrieved by any neglect, act, or thing done, or omitted by the constable, headborough, or tythingman of such place, or by any of his majesty's justices of the peace;—or shall have any material objection to any part of the account delivered in by such constable, &c. of the sums by him expended on account of the said place, or to the determination of the justice, who examined and settled such account pursuant to the directions of that act;—they may, giving reasonable notice to the justice, constable, &c. appeal to the next general or quarter sessions for the county, riding, &c. where such place lies, who shall hear and finally determine the same: but if it shall appear to the justices, that reasonable notice was not given, they shall adjourn the appeal to the next quarter sessions. And the justices may order to the party, for whom 18 G. 3. c. 19. s. 4, 5.

such appeal shall be determined, reasonable costs, in like manner as they are empowered to do in cases of appeals concerning settlements, by the 8 and 9 *W.* 3. c. 30.

It has been holden that an indictment lies for not paying costs awarded by an order of sessions, upon discharging an appeal against a poor's rate, under the 17 *Geo.* 2. c. 38.

Rex v. Boys, B.R.M.27G.2. Say. Rep. 108.

Thus where, upon shewing cause against a rule for quashing an indictment, it appeared, that the indictment was for disobedience to an order of sessions, whereby costs were ordered to be paid by the defendant upon the dismission of an appeal to a poor's rate.

By the Court.—It is in general true, that disobedience to an order of sessions is an indictable offence.

It has been said, that as the sessions are only empowered by the 17 *Geo.* 2. c. 38. to order costs upon an appeal of this sort, in the same manner as they are by the 8 and 9 *W.* 3. c. 30. empowered to do upon an appeal to an order of removal, an indictment does not lie in the present case, because the remedy given by the 8 and 9 *W.* 3. is by distress: but this objection is not well founded, for the remedy by distress is only given, where the person ordered to pay the costs lives out of the jurisdiction of the court. Rule discharged.

S. C. B. R. T. 28 G. 2. Say. Rep. 143.

The same objection was afterwards a second time made upon a demurrer to this indictment, and again over-ruled by the Court.

ANOTHER objection upon the demurrer was, that the charge in the indictment was not positive, but by way of recital. It was as follows:—whereas the Reverend *J. S.* did appeal, &c. this court doth dismiss the appeal as frivolous, and doth award twenty shillings, to be paid by the Reverend *J. S.* to the overseers of the parish of *Redburn*.

THE Court over-ruled this exception also, and held that it was necessary to set out the order of sessions in the indictment, and it was proper to set it out, as it is done, in the words of the order. But this is only matter of inducement; for the offence charged in this indictment is, that the defendant refused to pay the costs awarded, and it is charged positively that he did refuse.

SECT. IV.

Of Costs, upon removing Convictions, &c. by Certiorari.

IT is enacted by the 16 *Geo.* 3. c. 30. s. 19. (an act against *deer*-stealers) "That no *certiorari* shall be allowed to remove any conviction or other proceedings on this act, unless the party convicted shall, before the allowance of such *certiorari*, become bound to the prosecutor in the sum of one hundred pounds, with sufficient sureties as the justice before whom the offender was convicted [*shall approve of* (*a*),] with condition to pay unto the said prosecutors within thirty days after such conviction confirmed, *on* (*b*) a *procedendo* granted, his full costs, and damages, to be

Upon removing proceedings on 16 G. 3. c. 30. by *certiorari*, party convicted to become bound in 100*l.* with sufficient sureties for payment of costs and damages to prosecutor.

(*a*) These words are omitted in the statute; but

they, or some such like, are necessary to complete the sense.

"ascertained upon his oath;"—and shall also become bound to the justice before whom the offender was convicted, in sixty pounds, for each offence; to prosecute such *certiorari* with effect; and to pay the forfeitures to the justice, to be distributed according to the directions of that act, or to render to the justice such person convicted within thirty days after conviction confirmed, or a *procedendo* granted.

(b) So in the statute.

Appeal to the sessions.

By 16 *Geo.* 3. c. 30. s. 21. "If any person shall think "himself aggrieved by the determination of any justice upon "conviction of any of the offences in this act, and shall not "have sought his remedy, by removing the matter by *certio-* "*rari* as aforesaid, such person may appeal to the general "or quarter sessions of the peace, to be held for the said "county, division, or place where such person was convicted "next after the expiration of twenty days from the time of "such conviction; giving to the prosecutor six days notice, "in writing, of his intention of bringing and prosecuting "such appeal, and of the matter thereof; and entering into "recognizance before a justice, with two sufficient sureties, "to be approved by the said justice, on *conviction*, (c) to "appear and try the appeal at such sessions, and to abide by "the order or determination of such court, and for payment "of such costs and charges as shall be awarded at the said "court. And in case the conviction shall be there affirmed, "the party appealing shall pay to the prosecutor his full "costs, to be ascertained by order of the said court of "sessions."

(c) So in the statute.

Vide post.

But by the 23 *sect.* of 16 *Geo.* 3. c. 30. it is enacted,

" that no such conviction shall be removed or removeable by " *certiorari*, or any other writ or process whatsoever, into " any of his majesty's courts of record at *Westminster*, any " law or statute to the contrary notwithstanding."

THE 5 *Ann.* c. 14. s. 2. (an act for the better preservation of the game,) enacts,—" that [no] (1) *certiorari* shall " be allowed to remove any conviction or other proceedings " on this act, into any of the courts at *Westminster*, upon " any pretence whatsoever, unless the party convicted shall, " before the allowance of such *certiorari*, become bound to " the prosecutor in fifty pounds, with such sufficient securi- " ties as the justice before whom the offender shall be convict- " ed, shall think fit, with condition to pay to the prosecutor " within fourteen days after the conviction [confirmed,] (1) " or *procedendo* granted, his full costs and charges, to be " ascertained upon his oath. And in default thereof, the " justice shall proceed in execution of the conviction, in such " manner as if no *certiorari* had been awarded."

No *certiorari* to be allowed to remove a conviction on 5 Ann. c. 14. unless the party convicted become bound to the prosecutor in 50*l.* with sufficient securities to pay full costs and charges.

AND the like in effect is enacted by the 4 and 5 *W.* and *M.* c. 23. s. 7. (which is entitled, an act for the more easy discovery and conviction of such as shall destroy the game of this kingdom,) in relation to convictions on that statute.

AFTER reciting, that, in many cases, where his majesty's

(1) The word [*no*] is inserted instead of the words [*if any*] which are in the act, since the former word seems necessary to make up the sense; and the word [*confirmed*] is added for the same reason. Vide 2 Burn's Just. ed. 16. p. 336.

justices of the peace by law were empowered to give or make judgments or orders, divers writs of *certiorari* had been procured to remove such judgments or orders into his majesty's Court of King's Bench at *Westminster*, in hopes thereby to discourage, and weary out the parties concerned in such judgments or orders, by great delays and expences;—the 5 *Geo.* 2. c. 19. s. 2. enacts, "That no *certiorari* shall be "allowed, to remove any such judgment or order, unless the "party or *parties prosecuting* (1) such *certiorari*, before the "allowance thereof, shall enter into a recognizance with "sufficient sureties, before one or more justices of the peace "of the county or place, or before the justices at their general "quarter sessions, or general sessions, where such judgment "or order shall have been given or made, or before any one "of his majesty's justices of the said Court of King's Bench, "in the sum of fifty pounds, with condition to prosecute the "same at his or their own costs and charges with effect, with-"out any wilful or affected delay, and to pay the party or "parties in whose favour, and for whose benefit such judg-"ment or order was given or made, within one month after "the said judgment or order shall be confirmed, their full "costs and charges, to be taxed according to the course of "the court where such judgments or orders shall be con-"firmed; and in case the party or parties prosecuting such "*certiorari*, shall not enter into such recognizance, or shall "not perform the conditions aforesaid, it shall and may be "lawful for the said justices to proceed and make such fur-

No *certiorari* to be allowed to remove justices' orders, without a recognizance in 50*l.* to prosecute with effect, and pay full costs and charges, in case such orders be affirmed.

On refusal of recognizance, justices to proceed.

(1) The party prosecuting a *certiorari* to remove a conviction, &c. must, under this act, *himself enter into a recognizance with two sureties*, in 50*l.* each, to prosecute with effect, &c. The King v. Boughey and others, B. R. P. 31 G. 3. 4 T. R. 281.

" ther order or orders for the benefit of the party, or parties " for whom such judgment shall be given, in such manner as " if no *certiorari* had been granted."

5 *Geo.* 2. c. 19. s. 3. " And it is hereby further enacted, " that the recognizance shall be certified into the Court of " King's Bench, and there filed with the *certiorari*, and order " or judgment thereby removed; and if the said order or " judgment shall be confirmed by the said court, the persons " entitled to such costs for the recovery thereof, within ten " days after demand made of the person or persons who " ought to pay the same, upon oath made of the making " such demand, and refusal of payment thereof, shall have an " attachment granted against him or them by the said court, " for such contempt, and the said recognizance shall not be " discharged, until the costs shall be paid, and the order so " confirmed shall be complied with and obeyed."

Recognizance to be certified into the King's Beneh.

If party refuse to pay costs after the order affirmed, attachment shall be granted against him for the contempt.

It may be proper to take notice of another statute upon this subject, the 13 *Geo.* 2. c. 18. s. 5.; by which it is enacted, that no writ of *certiorari* shall be granted, to remove any conviction, judgment, order, or other proceedings, before any justice of the peace, or the general or quarter sessions, unless it be applied for within six calendar months next after such conviction, (1) &c. had or made, and unless it be duly proved upon oath, that the party suing forth the same, hath given six days notice thereof in writing, to the justice or

(1) A *certiorari* to remove a conviction must, by this act, be applied for within six months after the *date* of such conviction. The King v. Boughey, B. R. P. 31 G. 3. 4 T. R. 281.

justices, or two of them, (if so many there be,) before whom such conviction, &c. was had or made, to the end, that such justices, or the parties therein concerned, may shew cause, if they so think fit, against issuing the *certiorari*.

The King v. Eaton, B. R. M. 28 G. 3. 2 T. R. 89.

THE nineteenth and twenty-third clauses of the statute 16 *Geo.* 3. c. 30. above stated, at first view appear repugnant and irreconcileable; but the Court of King's Bench determined, in a very late case, that the result of the several provisions in this act is, that the defendant has an option, either to remove the proceedings from before the justice convicting, by *certiorari*, or to appeal to the quarter sessions; that where he adopts the latter mode, the *certiorari* is barred, but not in the former case.

IN the *King* v. *Dore*, it was holden, that upon the affirmance of a conviction—for deer-stealing, the prosecutor was entitled to taxed costs only, under the 3 *W.* and *M.* c. 10. s. 6. That act, with many others relating to this subject, is indeed repealed by the 16 *Geo.* 3. c. 30. but the words of it, as far as respect the quantity of the prosecutor's costs, and the mode in which they are to be ascertained, are adopted in the latter statute.

The King v. Dore, B. R. H. 12 G. 2. Andr. 352.

THUS a conviction against the defendant for deer-stealing, having been removed by *certiorari*, and affirmed in this court, it was moved that the costs might be referred to the master for taxation in an adversary way; the defendant having given a bond for the costs, pursuant to the 3 *W.* and *M.* c. 10. s. 6.

On the other side it was argued, that an affidavit having been made by the prosecutor that every penny set down in the bill of costs had been paid by him, he ought to be reimbursed the same, it being the design of the act, that the prosecutor should have nothing to pay even his own attorney.

But *per Cur.*—Although the words of the act are "*full "costs and damages,*" yet the prosecutor ought not to have such allowed as are unusual or unreasonable. And Probyn, *Justice,* said, that the bill ought to be taxed as between attorney and client. A rule was therefore granted for referring the bill to the master.

Where a *certiorari* is brought to remove a conviction upon the 5 *Ann.* c. 14. from absolute necessity, and not for vexation, nor with a view to controvert the conviction, the defendant shall not pay costs, notwithstanding the conviction be affirmed.

Accordingly, a conviction upon the game laws having been removed by *certiorari* into the Court of King's Bench, and there affirmed, the defendant obtained a rule for the prosecutor to shew cause why the master of the Crown-office should not be directed to *forbear,* and *not to proceed* to tax his (the prosecutor's) costs, relative to the affirmance of the conviction; and also why the bond entered into by or on the behalf of the defendant, on allowing the *certiorari,* should not be delivered up to be cancelled. Rex v. Midlam, B. R. T. 5 G. 3. 3 Burr. 1720.

The present rule was grounded on an affidavit of hard-

ship and oppression upon the defendant; namely, that although he had *paid* the forfeiture upon the conviction, yet an action had been brought against him for the same offence; and when he wanted to plead this conviction in bar of the action, the justice had refused to give him a copy of it, and he was obliged to remove it by *certiorari*; and the *prosecutor* set it down in the paper, and got it affirmed; and then the prosecutor became nonsuited in the action.

On shewing cause against this rule, it was urged, on behalf of the prosecutor, that the 5 *Ann.* c. 14. directs full costs to be paid upon removing these convictions, in case they be *affirmed*, be the *certiorari* brought "*upon any pretence* "*whatsoever.*"

Lord Mansfield.—This is not a case within the intention of the act of parliament of 5 *Ann.* c. 14. s. 2. For, this *certiorari* was not brought for vexation, or out of obstinacy or perverseness; nor to overhale or object to the conviction: but an action being brought for the same offence, the defendant in that action could not obtain (though he ought to have had it) a copy of the conviction from the justice of the peace who made the conviction; and therefore he was obliged to bring a *certiorari* to remove it; and he removed it for that purpose only. The prosecutor, therefore, had no occasion to be at any expence about it; for the defendant did not object to it. But the prosecutor set it down in the paper, only to increase expence, and merely for vexation; supposing, that the defendant would have been obliged to pay for it.

THEREFORE the present rule ought undoubtedly to be made absolute.

WILMOT, *Justice*, was extremely clear, that this was not a case within the second section of the 5 *Ann.* c. 14. And he thought (as Lord MANSFIELD also did) that the justice ought to have given the defendant a copy of the conviction, without putting him to the trouble and expence of bringing a *certiorari* to remove it. The bringing the action for the same offence was a gross oppression, and the plaintiff in it was nonsuited. And though he knew that the *certiorari* was brought only from necessity, (as the justice had refused to give the defendant a copy of it,) and that the defendant had actually pleaded it, and used it as a good one;—what, but oppression, could induce the prosecutor to set it down and get it affirmed? He had had the effect of it; the penalty had been paid.

THEREFORE the rule ought to be made absolute.

YATES, *Justice*, also concurred, for the same reasons.

THE justice ought to have given the defendant a copy of the conviction; for it was a record, and the defendant was entitled to it. He thought the proceeding of the prosecutor to have been a very oppressive one, in every stage of it; and that the bringing the *certiorari*, under the circumstances of the present case, did not entitle the prosecutor to his costs upon affirmation of the conviction; and, therefore, this rule ought to be made absolute.

ASTON, *Justice*, was clearly of the same opinion.

RULE made absolute; and the prosecutor to pay the costs out of pocket, of this application.

IF any material part of an order of sessions be *quashed*, although the residue be affirmed, by the King's Bench, upon it's removal thither by *certiorari*, no costs are payable under the 5 *Geo.* 2. c. 19.

The King v. the Inhabitants of Madley, B.R.M. 17G.2. 2 Str. 1198.

AS where an order of two justices for the removal of a man, his wife, and daughter, having been confirmed, upon appeal to the sessions, generally, was removed by *certiorari* into the King's Bench, and there quashed as to the daughter, her age not being stated, nor the place adjudged to be that of her settlement; but as to the man and his wife, both orders were affirmed.

IT then became a question, upon the statute of 5 *Geo.* 2. c. 19. s. 2. whether costs should be paid? And a case was cited of the Inhabitants of *Great Chart*, *M.* 16 *G.* 2. where the Court affirmed the order of sessions as to the point of the appeal, but quashed a reservation in the same order as to costs in case of a new removal; and it was determined, that the prosecutor of the *certiorari* should pay costs.

Rep. in 2 Str. 1173. Burr. S.C. 194. But neither book takes any notice of the costs occasioned by the *certiorari*.

BUT by the Court.—That is a very different case from this, for there the party could not be affected by the part of the order which was quashed, till the sessions had made an actual order about the costs; and the bringing it up for the

purpose of quashing that part was unnecessary, and consequently vexatious, which is the true test to go by. Whereas here the parish who brought the *certiorari* were unjustly burdened with the daughter, and had no other remedy but to come here. And the parliament never intended to punish them for taking a legal remedy against a *gravamen*. Therefore the recognizance given on bringing the *certiorari* must be discharged.

So where a sessions case, removed into B. R. by *certiorari*, is sent down to be restated, and upon its being returned amended, the parish removing it, abandon the prosecution, they are not liable to costs under the 5 *Geo.* 2. c. 19.

Rex v. Hitcham, B. R. P. 33 G. 2. Burr. S. C. 504. S. P. Rex v. Bray, B. R. P. 11 G. 3. Ibid. 687.

But if they *dispute* the *amended order*, they shall pay costs.

Thus, upon arguing a settlement case, the Court, not being satisfied as to one fact, sent it down to the sessions to be restated. (*a*) The sessions accordingly stated that fact, and returned the case here; when the Court thought that the additional fact stated by the sessions was decisive, and therefore confirmed the order without hearing any argument:—but the counsel on both sides were instructed, and prepared to argue it.

The King v. the Inhabitants of Edgeworth, B. R. H. 31 G. 3. 4 T. R. 218. (*a*) Vide 3 T. R. 354.

A motion was now made on the part of the parish of *Edgeworth*, to discharge their recognizance to pay costs, on the ground that their objection to the order of sessions, as it was originally stated, was well founded; and that conse-

quently the other parish would not have been entitled to the costs, if the Court had given judgment on that case. And the cases of *R.* v. *Hitcham*, and *R.* v. *Bray*, were relied on.

But the Court said, that in those cases, the parties suing out the *certiorari* were not held liable for the costs, because when the errors were corrected they abandoned the prosecution. But that, in the present case, the parish of *Edgeworth* had not abandoned the pursuit, after the case was restated, but had taken the chance of the judgment of the Court being given in their favour, when it came here a second time; and therefore they ought to pay the costs. Rule discharged.

The King v. Jenkinson, B. R. M. 26 G. 3. 1 T. R. 82.

Where there is no recognizance entered into for the payment of costs upon removing summary proceedings by *certiorari*, the court are not authorized to grant them by the 13 *Geo.* 2. c. 18. But it is discretionary in the court whether they will grant a *certiorari* or not; and, in the *King* v. *Jenkinson*, the Court said, that, for the future, they would oblige the party applying for a *certiorari* to enter into a recognizance to pay costs.

SECT. V.

Of Costs, on an Information for a Misdemeanor.

The 4 and 5 *W.* and *M.* c. 18. recites, that divers malicious and contentious persons had more of late, than in times past, procured to be exhibited and prosecuted informations in

their majesties' Court of King's Bench, at *Westminster*, against persons in all the counties of *England*, for trespasses, batteries, and other misdemeanors, and after the parties so informed against had appeared to such informations, and pleaded to issue, the informers had very seldom proceeded any farther, whereby the persons so informed against had been put to great charges in their defence; and although at the trials of such informations verdicts had been given for them, or a *noli prosequi* entered against them, they had no remedy for obtaining costs against such informers;—and thereupon enacts,

3 Burr. 1616. 1817. 1 Bl. 542.

"That the clerk of the crown, in the said Court of King's "Bench, for the time being, shall not, without express order, "to be given by the said court, in open court, exhibit, receive, "or file any information for any of the causes aforesaid; or "issue out any process thereupon, before he shall have taken, "or shall have delivered to him, a recognizance from the per- "son or persons procuring such information to be exhibited, "with the place of his, her, or their abode, title, or profession, "to be entered to the person or persons against whom such "information or informations is or are to be exhibited, in the "penalty of twenty pounds, that he, she, or they will effec- "tually prosecute such information or informations, and "abide by and observe such orders as the said court shall "direct; which recognizance the said clerk of the crown, "and also every justice of the peace, of any county, city, "franchise, or town corporate (where the cause of any "such information shall arise), are hereby empowered to "take; after the taking whereof by the said clerk of the "crown, or the receipt thereof from any justice of the peace, "the said clerk of the crown shall make an entry thereof upon

Clerk of the crown to exhibit no information, except by order of court, nor issue process, till prosecutor has given recognizance to the person informed against in 20 *l.* to prosecute with effect, and abide by the orders of the court.

Recognizance to be taken by the clerk of the crown, or any justice, and filed in the Crown-office for public inspection.

" record, and shall file a memorandum thereof in some public " place in his office, that all persons may resort thereto with- " out fee; and in case any person or persons against whom " any information or informations for the causes aforesaid, or " any of them, shall be exhibited, shall appear thereunto, and " plead to issue, and that the prosecutor or prosecutors of such " information or informations shall not, at his and their own " proper costs and charges, within one whole year next after " issue joined therein, procure the same to be tried; or if upon " such trial a verdict pass for the defendant or defendants, " or in case the said informer or informers procure a *noli* " *prosequi* to be entered; then, in any of the said cases, the " said Court of King's Bench is hereby authorized to award " to the said defendant and defendants, his, her, or their costs, " unless the judge, before whom such information shall be " tried, shall, at the trial of such information, in open court, " certify upon record, that there was a reasonable cause for " exhibiting such information; and in case the said informer " or informers shall not within three months next after the " said costs taxed, and demand made thereof, pay to the said " defendant or defendants the said costs, then the said de- " fendant and defendants shall have the benefit of the said " recognizance, to compel them thereunto."

If person informed against appear and plead to issue, and the prosecutor do not, at his own costs, proceed to trial within one year after issue joined; or if, upon trial, a verdict pass for the defendant; or informer enter a *noli prosequi*; the defendant shall have costs, unless the judge, at the trial, certify that there was a reasonable cause for such information.

If the informer do not, within three months, after taxation and demand, pay the costs, the defendant shall have the benefit of his recognizance to compel him.

Only to extend to informations by master of the Crown-office.

BUT by the 6th sect. of this act it is provided, " That no- " thing hereof shall extend, or be construed to extend, to " any other information than such as shall be exhibited in " the name of their majesties' coroner, or attorney, in the " Court of King's Bench, for the time being, commonly called " the master of the crown office."—Whence it follows, that in-

formations exhibited by the attorney-general remain as they were at the common law.

It hath been determined, that where an information is tried at bar, the defendant can have no costs within this statute; for the amount of the recognizance prescribed by the act is only 20 *l.* which would be insufficient to answer bar costs. Besides, the words are, that the court is authorized to award costs, &c. "unless the judge, before whom the information shall be tried, shall, at the trial, in open court, certify upon record, that there was a reasonable cause for exhibiting such information," which is most naturally to be understood of a trial at *nisi prius*; and it would be absurd to suppose that the statute intended that the justices of the King's Bench, at a trial before themselves, should make a certificate to themselves. To which may be added, that where a cause is of such consequence as to be tried at the bar, it may reasonably be intended to be out of the purview of the statute, which was chiefly designed against trifling and vexatious prosecutions.

The Queen v. Clerk, B. R. T. 1 Ann. 7 Mod. 47.

2 Hawk. P. C. 6 Ed. 374.

So if there be several defendants in an information for a misdemeanor, and any one of them be found guilty, those who are acquitted are not entitled to costs by this statute, although the judge may not have certified a reasonable cause for exhibiting the information; because, previous to the 8 and 9 *W.* 3. c. 10. no defendant in a civil action, in such like case, could recover any costs, and the act of 4 and 5 *W.* and *M.* c. 18. cannot be intended to give defendants in in-

The Queen v. Danvers and others, B. R. 6 Ann. Salk. 194. S. P. 1 Lill. Abr. 480. D.

formations any other right to costs, than such as they before possessed in civil actions.

Rex v. Woodfall, B. R. P. 13 G. 2. 2 Str. 1131. Rex v. Davis, Adj. M. 10 Ann. Hawk. P. C. 6 Ed. 375.

But where the defendant in an information is acquitted, and the judge does not certify, at the trial, a reasonable cause for exhibiting the information, the Court of King's Bench have no discretionary power to grant or refuse costs, but are bound by the 4 and 5 *W.* and *M.* c. 18. in such case, to award them; and that whether the acquittal were upon the merits, or contrary to the direction of the judge, and against evidence, or only from a slip in point of form, and howsoever notorious the offence might be. For where a court is authorized by statute to do a matter of justice to the party, upon certain circumstances, it has no discretionary power of considering whether it ought to do it, or not, when a case appears to be within those circumstances. To which may be added, that the statute being general as to all cases, wherein the judge, who tries the information, doth not certify a reasonable cause, seems to imply, that it shall be left to such judge only for this purpose to consider whether the prosecution were reasonable or not, and it is the prosecutor's folly not to apply to him.

Comb. 345.

And the act intends that the certificate of a reasonable cause, in order to deprive the defendant in an information of costs, upon an acquittal, shall be entered upon the *postea*.

Vide 3 Burr. 1817. 1819.

In case the defendant be acquitted on an information, he is not entitled to costs beyond the extent of the recognizance

entered into by the prosecutor, which is limited by the statute to 20 *l.*

THUS, on an information being filed against the defendants, who were justices of the peace, for improperly granting an ale-licence, *Carter*, the prosecutor's attorney, entered into a recognizance in 20 *l.* to prosecute the information with effect, as required by the 4 and 5 *W.* and *M.* c. 18. At the trial at the last assizes for *Surry* the defendants were acquitted; and their costs having been since taxed to 54 *l.* a rule was obtained to shew cause why an attachment should not issue against *Carter* for not paying those costs. This application was made for the purpose of taking the opinion of the Court on the construction of the 4 and 5 *W.* and *M.* namely, whether, as the statute had limited the recognizance to 20 *l.* the Court were confined to that sum, or were authorized to award the defendants their whole costs.

The King v. Filewood and another, B. R. M. 28 G. 3. 2 T. R. 145.

AFTER argument at the bar, the Court took time to consider. And

ASHURST, *Justice*,—now delivered their opinion; and said, that, upon looking into the act of parliament, and the cases of the *King* v. *Howell*, and the *King* v. *Morgan*, the costs were limited to the sum specified in the act, namely, 20 *l.* and, there being no authority to the contrary, they were not warranted in giving more than was mentioned in the recognizance. But he intimated, that, perhaps, in future, it might be proper to adopt some new rule, such as refusing to grant any information unless the prosecutor would undertake to pay

Post.

all the costs, in case he did not substantiate his charge; but that was a matter for future consideration. Rule discharged on paying 20*l.*

The King v. R. Brooke and others, B.R.H. 28 G. 3. 2 T. R. 197.

HOWEVER, in a subsequent case, notwithstanding what was thrown out in the *King* v. *Filewood*, the Court refused a motion to compel the prosecutor of an information to give security for the costs, in case the defendants should be acquitted, over and above the recognizance in 20*l.* required by the 4 and 5 *W.* and *M.* saying, that if any alteration were necessary, it had better be done by legislative authority, than by an order of the Court.

Comb. 225. 419. 2 Str. 874. B. R. H. 159.

THE prosecutor of an information for a misdemeanor shall pay costs for not proceeding to trial pursuant to notice, notwithstanding issue may not have been joined a twelvemonth.

The King v. Heydon and others, B.R.H. 2 G. 3. 1 Bl. 356. S. C. 3 Burr. 1304.

THUS, on an information against the defendants for bribery at the last election for *Evesham*, the prosecutor gave notice of trial, but did not proceed in pursuance thereof. Whereupon the defendants obtained a rule for the master of the Crown-office to tax their costs: which rule it was now moved, on behalf of the prosecutor, to discharge; because, 1st, The information had not been filed a year; 2dly, *Philips*, the defendant's agent, had secreted the corporation-books, which were the prosecutor's only evidence, although he had from day to day flattered the prosecutor that the books should be produced; and his refusal to produce them obliged the prosecutor to withdraw his record, and was the sole cause of his not going on to trial.

LORD MANSFIELD.—By the constant course of the court, and universal practice, the defendant is entitled to costs, if the prosecutor gives notice of trial, and neither goes to trial, nor countermands the notice in time; and no instance can be produced, that I know of, to the contrary.

AN exception is contended for in the present case, on account of the misbehaviour of defendant's agent, by drawing in the prosecutor to give notice, which made him forfeit his costs. This, if proved, might be a reason for *not* giving the defendant any costs. But it does not appear to be so. The prosecutor swears "that he was flattered with expectations;" —these are conclusions, instead of facts. He should have sworn to messages, and words which passed between them; upon which the Court would have formed the proper conclusion. Nor in fact was he flattered, for he subpœnaed *Robins*. His not producing evidence, which he was not by law obliged to produce, will not forfeit his principal's costs. Therefore there is no reason to except this out of the general rule.

DENISON and WILMOT, *Justices*, of the same opinion.

FOSTER, *Justice*, absent. Rule, for discharging the former rule, discharged.

IT was determined in one case, where a rule had been made for the prosecutor of an information to pay costs for not proceeding to trial pursuant to notice, that the executor of the

The King v. Earl, B. R. T. 4 G. 2. 2 Str. 874. S.C. 1 Barnard. 335, 8.

defendant (who died after the making of the rule, but before the costs were paid, or *taxed* (*a*), was not entitled to them: —nor would he have been liable, if the testator had been ruled to pay them.

(*a*) Vide the King v. Chamberlayne, ante. 544.

The King v. Gohaire, H. 3 G. 2. 1 Barnard. K. B. 275.

BUT the liability of a prosecutor of an information to pay costs for not going on to trial, must be understood to relate only to cases where the prosecution is carried on entirely at the instance of a private individual; for if the king's name be more than barely made use of, the general rule, that the crown neither pays nor receives costs, then attaches. Therefore, where, in an information filed in the attorney general's name, for beating a custom-house officer, the prosecutor had given notice of trial, but not countermanded it, till the defendant had retained his counsel, and was ready to attend, the Court refused to grant costs to the defendant.

The King v. Morgan and another, B. R. H. 20 G. 3. Doug. 2 ed. 314.

UPON shewing cause against a rule for filing an information against the two defendants, one of them for sending, the other for carrying, a challenge, the Court thought there was ground for granting the information. But, under all the circumstances, were of opinion, that it would be a sufficient punishment if the defendants paid the prosecutor's costs; and, therefore, discharged the rule on those terms.

2 Burr. 787. 1162.

ALTHOUGH a justice of the peace acts illegally, yet, if he has acted honestly and candidly, without oppression, malice, revenge, or any bad view or ill intention whatsoever, the Court of King's Bench will never punish him by the extraordinary

course of an information, but leave the party complaining to the ordinary legal remedy, or method of prosecution, by action, or by indictment.

And if it appear, upon shewing cause against a rule for filing an information against a justice of the peace, for a misdemeanor in his office, that he has not only acted rightly, but upon right motives, the Court will discharge the rule *with costs*.

The King v. Benjamin Cox, Esq. B. R. P. 32 G. 2. 2 Burr. 785.

So, upon shewing cause why an information should not be granted against two justices of peace and others, for a misdemeanor relating to the conviction of a poacher, and the circumstances attending it;—the Court thought proper, upon fully hearing and considering all the affidavits, and what was urged by the counsel on both sides, to discharge the rule, as to *all* the defendants; *with costs to be paid to the justices*, they not having acted illegally, but without costs, as to the others.

The King v. Palmer and Baine, Esqs. and others, B. R. P. 1 G. 3. 2 Burr. 1162.

And, in another case, the Court discharged a rule for an information against a justice for obstructing divine service in a church, and insulting the rector, *with costs*;—because the rector, in his affidavit, upon which the original application was grounded, had suppressed the truth, and thereby misrepresented the case.

The King v. Wroughton, Esq. and others, B R.P. 5 G. 3. 3 Burr. 1683.

But if, on shewing cause against such a rule, it appear that the justice acted in some respects *irregularly*, though without any bad, oppressive, or injurious intention, the

The King v. Fielding, Esq. B.R.H.32G.2. 2 Burr. 722.

Court will, indeed, discharge the rule for an information, but they will do it *without* costs, notwithstanding the complaint against the defendant be ill-grounded, misrepresented, and even partly false; for although such a complainant ought to be punished in costs, yet the justice, in such case, ought not to receive them.

SECT. VI.

Of Costs, on an Information in the Nature of a Writ of Quo Warranto.

THE 9 *Ann.* c. 20. s. 5. (entitled, 'An act for rendering the proceedings upon writs of *mandamus*, and informations in the nature of a *quo warranto*, more speedy and effectual; and for the more easy trying and determining the rights of offices and franchises in corporations and boroughs,') enacts, —"That in case any person or persons, against whom any "information or informations in the nature of a *quo war-* "*ranto* shall be exhibited for usurping, intruding into, or "unlawfully holding and executing the offices of mayors, "bailiffs, portreeves, and other offices, within cities, towns- "corporate, boroughs, and places, within that part of *Great* "*Britain* called *England* and *Wales*, in the Court of Queen's "Bench, the courts of sessions of counties palatine, or in any "of the courts of grand sessions in *Wales*,—shall be found "or adjudged guilty of an usurpation, or intrusion into, or "unlawfully holding and executing any of the said offices, or "franchises, it shall be lawful for the said courts respectively,

In case defendant in an information in nature of *quo warranto* be found guilty of an usurpation, &c. of office of mayor, &c. the court shall give judgment of ouster, and the relator shall recover costs.

"as well to give judgment of *ouster* against such person or "persons, of and from any of the said offices or franchises, "as to fine such person or persons respectively, for his or "their usurping into, &c. any of the said offices or franchises; "and also to give judgment, that the relator or relators, in "such information named, shall recover his or their costs of "such prosecution; and if judgment shall be given for the "defendant or defendants in such information, he, or they, "for whom such judgment shall be given, shall recover his "or their costs therein expended against such relator or re-"lators; such costs to be levied by *capias ad satisfaciendum*, "*fieri facias*, or *elegit*."

If judgment be given for the defendant, he shall have costs against the relator.

By the 32 *Geo.* 3. c. 58. (an act for the amendment of the law in proceedings upon information in nature of *quo warranto*,) it is enacted,—"That from and after the first day "of *Trinity* Term, in the year 1793, it shall and may be "lawful for the defendant or defendants to any information "in the nature of a *quo warranto*, for the exercise of any "office or franchise in any city, borough, or town corporate, "whether exhibited with leave of the court, or by his majesty's "attorney-general, or other officer of the crown, on behalf "of his majesty, by virtue of any royal prerogative or other-"wise, and each and every of them severally and respectively, "to plead that he or they had first actually taken upon them-"selves, or held or executed the office or franchise which is "the subject of such information, six years or more before "the exhibiting of such information, such six years to be "reckoned and computed from the day on which such de-"fendant so pleading was actually admitted and sworn into

From the 1st day of *Trinity* Term, 1793, defendants to informations in nature of *quo warranto*, for the exercise of any office, may plead the holding it six years or more, &c.

"such office or franchise; which plea shall and may be pleaded either singly, or together with and besides such plea as he or they might have lawfully pleaded before the passing of this act, or such several pleas as the court on motion shall allow; and if, upon the trial of such information, the issue joined upon the plea aforesaid shall be found for the defendant or defendants, or any of them, he or they shall be entitled to judgment, and to such and the like costs as he or they would by law have been entitled to, if a verdict and judgment had been given for them on the merits of their title."

And if the issue joined on such plea be found for the defendants, they shall have like costs, as if a verdict and judgment had been given for them on the merits of their title.

32 *Geo.* 3. c. 58. s. 2. "Provided always, and be it enacted, that in every such case the prosecutor of such information may reply to such plea, any forfeiture, surrender, or avoidance, by the defendant, of such office or franchise happening within six years before the exhibition of such information, whereon the defendant may take issue, and shall be entitled to costs in manner aforesaid."

Forfeiture of office within six years before information, may be replied to such plea, &c.

The King v. the Town of Hertford, B. R. M. 11 W. 3. Carth. 503. S. C. Salk. 376.

BEFORE the exhibiting of any information in the nature of a *quo warranto*, the relator ought to enter into a recognizance in 20 *l.* to prosecute the same with effect, &c. pursuant to the 4 and 5 *W.* and *M.* c. 18.; for that statute, of which we have already taken notice, (*a*) extends to all informations whatsoever exhibited by the master of the Crown-office; and though it may be objected, that an information in the nature of a *quo warranto*, being a proper means to try a right, is not within the meaning of the statute, which mentioning trespasses, batteries, and other misdemeanors, may be reason-

(*a*) Vide ante.

ably construed to intend such other misdemeanors only as are of an inferior nature, like to those specified, which are generally wrangling and frivolous ones; yet seeing this is a remedial law, and therefore ought to be largely construed, and such informations may be as vexatious as any other, and always suppose an usurpation of some franchise, and every such usurpation is certainly a misdemeanor, it hath been settled that this statute, (4 and 5 *W.* and *M.* c. 18.) does extend to them.

And, if the prosecutor do not proceed to trial within a twelvemonth after issue joined, the defendant is entitled to costs to the extent of such recognizance.

Thus, upon a rule to shew cause why the prosecutor of an information in the nature of a *quo warranto* should not pay costs, the circumstances were, that the prosecutor had duly entered into a recognizance in the penalty of 20*l.* pursuant to the 4 and 5 *W.* and *M.* c. 18.; but had not procured the information to be tried within one year after issue was joined therein.

The King v. Howell, B. R. P. 9 G. 2. B. R. H. 247. S. P. The King v. Morgan, B. R. P. 9 G. 2. 2 Str. 1042.

Lord Hardwicke.—I have always taken this to be within the act of parliament. I believe this is the first application for costs; but it appears to me both from the act, and the practice upon the act, to be a case within it. As to the practice, a recognizance to answer costs has been uniformly given in these informations, which could only be done as being within the statute. The true meaning of the act, and which is warranted by practice, is, that the master of the

4 and 5 W. and M.

Crown-office should file no information without leave of the Court, nor issue process thereupon without a recognizance. As to these informations not being for misdemeanors, it is now too late to make that objection, since the practice has been always otherwise. The Court indeed have themselves made this distinction, to grant informations for public usurpations, but if it is only of a private franchise, not concerning public government, as a fair, &c. the Court has sometimes refused them, and directed an application to the attorney-general. You cannot, in this case, have a rule for what costs shall be taxed in general, for you can have no more than the penalty, to which the recognizance extends, *viz.* 20*l.*; but if the cause had gone to trial, you might have had your whole costs, because upon the statute of 9 *Ann.* c. 20. judgment would be given for costs.

Vide ante, 575.

RULE for defendant to have his costs, as far as the recognizance extended.

The King v. Powell, B. R. H. 3 G. 1. 1 Str. 33. S. P. Anon. B.R. P. 27 G. 2. Say. Rep. 130.

So the prosecutor of an information in the nature of a *quo warranto* shall pay costs for not proceeding to trial pursuant to notice of trial; for although in the case of the king there can be no *laches*, yet a subject in these prosecutions shall pay costs, as in common actions.

IF any one of several issues in a *quo warranto* information, be found for the prosecutor, upon which judgment of ouster is given, he is entitled to costs on all the issues.

The King v. Downes, B.R.

THUS, where eight issues were joined on the pleadings on

an information in the nature of a *quo warranto*, which called upon the defendant to shew by what title he exercised the office of bridge-master of the borough of *Bridgenorth*. At the trial, six of them were found for the defendant, and the two last, which were on the election and admission of the defendant, were found for the prosecutor. M. 27 G. 3. 1 T. R. 453.

A RULE having been obtained to shew cause, why the master of the Crown-office, in taxing the costs in this cause, should not be directed to disallow the costs on account of the six issues found for the defendant, cause was now shewn; and it was contended, that it had been the constant practice to allow costs to the prosecutor on all the issues on *quo warranto* informations, if judgment were given against the defendant on any one. That no authority could be found contradicting this practice. That in the case of the *King* v. *Dunning*, *M.* 24 *G.* 3. *B. R.* where, on the trial of a *quo warranto* information, seven issues were found for the defendant, and two for the prosecutor, a similar application had been made, which was refused by the Court; and the costs were allowed to the prosecutor upon all the issues.

Per Curiam.—There is no analogy between this and civil proceedings. In doubtful cases, the practice which has uniformly obtained in the Crown-office since Queen *Anne*'s time, is sufficient to decide this question; and therefore the prosecutor is entitled to costs on all the issues. Rule discharged.

THE statute of 9 *Ann.* c. 20. does not extend to give costs

in an information in the nature of a *quo warranto*, unless for the usurpation, &c. of *corporate* offices, and *rights* to *freedom* in corporations, or other *corporate* rights.

The King v. Williams, B. R. M. 31 G. 2. 2 Burr. 402. S. C. 2 Bl. 93.

As where, upon a writ of error from the court of great session in the county of *Denbigh*, it appeared, that the defendant had been found guilty upon an information in the nature of a *quo warranto*, of wrongfully and unlawfully holding a court of record in the borough of *Denbigh*, in the absence of the two bailiffs of the borough, before whom or one of them such court, by the letters patent, incorporating the town of *Denbigh*, was to be holden. And that judgment was entered against him, *quod capiatur*, and be ousted from holding the same court for the future, and that he should pay costs according to the form of the statute. On the latter branch of which judgment, the writ of error was principally brought.

Lord Mansfield.—All corporations consist of officers and freemen. The stat. of 9 *Ann.* was meant to extend to both; and to give a remedy which could not be had at common law in these disputes, which are really between party and party, and which frequently settle the rights of voting for members of parliament. But it is not within the reason or meaning of the act, that it should extend generally to *all* offices or franchises exercised without authority from the crown within a corporation.

The body of the statute is very clear, and only extends to offices and franchises of being burgesses or freemen. The

conciseness of the title shall not control the body of the act. The title is no part of the law; it does not pass with the same solemnity as the law itself. One reading is often sufficient for it. And as for construing a statute by equity; equity is synonymous to the meaning of the legislature, and it does not appear, that the parliament meant to give costs in the present case.

HERE is no charge of usurping, or exercising, or claiming the office of bailiff, even by implication or inference. Holding a court is no necessary argument, that he intended to usurp the right. He might hold it by deputation, or by mistake. Costs are only given where two persons are trying a civil right; this is a mere misdemeanor. The statute judgment of costs is therefore wrong. But the common law part, *viz.* the judgment of ouster, is right.

DENISON, *Justice*,—concurred, that the statute part of the judgment, as to the *costs*, was wrong; but the common law part, namely, the judgment of exclusion from the future exercise of the franchise, was right.

HE said, there were a number of offices which a man might usurp, and be liable to an information for usurping, which were not franchises in corporations. But these "franchises" mentioned in the act, meant *corporate* rights, or *rights* to *freedom* in corporations. The words of the act were plain, and this was not a case upon which the informer could recover costs. Therefore the judgment as to costs ought to be reversed.

FOSTER, *Justice*,—was clear too, that this case was not within the act; which never intended to give costs in cases of this kind. The word "franchises" in the act, means only freedoms and rights to be members of the corporation.

THE act was drawn with great care and attention by Mr. *Justice* POWELL; and there is no reason to extend it beyond it's intention.

WILMOT, *Justice*, of the same opinion. Therefore,

THE common law judgment, *viz.* as to the *ouster* was affirmed; but the judgment for *costs* (founded upon the statute of 9 *Ann.*) was reversed.

A DEFENDANT in execution for the contempt, and for the costs on a *quo warranto* information, is entitled to be discharged under the Lords' act.

The King v. Pickerill, B. R. T. 32 G. 3. 4 T. R. 809.

THUS on a *quo warranto* information against the defendant, as a burgess of *Newcastle-under-Lyme*, a verdict was found for the relator on all the issues; on which judgment of ouster was entered up, "and that the defendant, in order "to satisfy our said lord the king for and on account of the "usurpation aforesaid, be taken, &c.; and that *J. Wilkin-* "*son* (the relator) do recover against the defendant 180*l.* "for costs, &c." On which a writ was issued requiring the sheriff of *Staffordshire* to take the defendant, &c. "to satisfy "us, concerning his redemption, by reason of his claiming to

"have, use, and enjoy the office of a burgess, &c.;" and this writ was endorsed thus, "allowed for costs 180*l.*"

A RULE was obtained, calling on the relator to shew cause "why the defendant should not be discharged out of the custody of the sheriff of the county of *Stafford*, on payment "of a small fine for his redemption, by reason of the premises whereof he stands convicted in this cause;" and it was stated, that the object of this motion was to enable the defendant to take the benefit of the Lord's act, at the next assizes, as to that part of the execution which related to the costs.

No opposition was made, on the behalf of the relator, to the defendant's being discharged out of custody as to that part of the execution, which related to the contempt, but it was insisted, that this rule could not be supported, because there was no pretence now to discharge him as to the other part, respecting the costs. On this ground

THE Court agreed, that the rule must be discharged; saying, however, that the fine to the king in such a case was merely nominal, and that that would be no objection to the defendant's being discharged out of custody under the Lords' act, as to the execution for the costs, which was now considered as an execution in a civil suit. Rule discharged.

THE Court will, under circumstances, discharge a rule for a *quo warranto* information *with costs*.

FOR where a rule was made for the defendant to shew The King v.

Carpenter, B. R. P. 9 G. 2. 2 Str. 1039.

cause against an information in nature of a *quo warranto*, to shew by what warrant he claimed to vote in the election of mayor of *Exon*, on pretence that the right was restrained to resident freemen, which the defendant was not; and, on shewing cause, it was extremely clear, that, both by charter and usage, the defendant was entitled to vote; the Court discharged the rule, with costs.

The King v. Lewis, B. R. P. 32 G. 2. 2 Burr. 780.

So where, upon shewing cause against such an information, to shew by what authority the defendant acted as capital burgess and alderman of *New Radnor*, it appeared to the Court, that the charge was exceedingly groundless and frivolous, and could not but be known to the prosecutor to be so, the rule was discharged, with costs.

The King v. Wardroper, B. R. M. 7 G. 3. 4 Burr. 1963.

AGAIN, upon shewing cause against a rule for an information in nature of a *quo warranto*, calling upon the defendant to shew by what right he claimed to be a corporator of the borough of *Winchelsea*, the circumstances were; that the defendant had been in possession of this office above nineteen years; that the relators themselves had voted for him at his election, and had concurred with his acting in this his corporate office upon many occasions, and never before objected to the legality of his right; that he had paid scot and lot; and that the objection to him, which was on the score of non-resiancy, was sworn on the *belief* only of three persons, but *positively* contradicted by others;—the Court held themselves warranted by the case of *New Radnor*, as the application was so very unreasonable and groundless, to discharge the rule, with costs.

CHAPTER XII.

OF COSTS, UPON SUPERSEDING, OR REVERSING, AN OUTLAWRY.

THE process of outlawry, in civil actions, being considered at this day, in no other light than as a process to compel an appearance of the party against whom a suit is commenced, any plausible cause, however slight, will, in general, be sufficient to reverse it. But then the defendant must pay full costs, and put the plaintiff in the same condition, as if he had appeared before the writ of *exigi facias* was awarded. 3 Bl. Comm. 284.

I SHALL first state such of the rules of the Court of Common Pleas as respect costs upon superseding or reversing of outlawries; and then proceed to the cases, which have been adjudged in that court, as well as in the King's Bench, on the same subject.

No defendant, who shall be outlawed, and who shall appear and reverse the outlawry, shall, upon such reversal, pay for costs to the plaintiff any sum of money, exceeding the usual costs of the *exigent* in this court, together with the fine to the king, upon the original writ (if any was paid), and all further costs shall be respited until the time of signing judgment for the plaintiff. Reg. T. 33 Car. 2. C. B.

Reg. M. 17 Car. 2. C. B. Reg. T. 2 Jac. 2. C. B. Whithall v. White, Barnes, 323.

IF a *supersedeas* be not put in to a writ of *exigent*, sued out of the Court of Common Pleas, at or before the day of appearance thereof, no *supersedeas* shall be allowed by any sheriff to any such writ, until the defendant shall have paid to the plaintiff, or his attorney, or left in the court with one of the prothonotaries, the full and just costs of suit therein.

Reg. M. 17 Car. 2. C. B. Reg. T. 2 Jac. 2. C. B. Barnes, 324.

AND, before the reversal of an outlawry, or a *supersedeas* made thereto, the defendant shall pay to the plaintiff, or his attorney, or leave in the court for him, the full and just costs of suit *to the* exigent.

Reg. T. 2 Jac. 2. C. B.

AND where the plaintiff, by virtue of such outlawry, hath taken an inquisition, and extended into the king's hands the goods, chattels, lands or tenements of the outlawed person, and returned the same into the Exchequer, such further just and reasonable costs shall be taxed by the prothonotary, and likewise paid to the plaintiff, or his attorney, or left in court for him or them, as the plaintiff hath been at in taking and prosecuting the said inquisition, before any certificate of such reversal shall be made by the clerk of the outlawries.

Reg. T. 1 W. and M. C. B.

WHERE any outlawry shall be transcribed into the Court of Exchequer, and process made out thereupon, and afterwards such outlawry shall be reversed, before any judgment entered for removing the king's hands, and the party outlawed restored to his possession, the prosecutor of such outlawry shall be paid such costs as shall be taxed by his majesty's remembrancer, or his deputy, for the proceedings in this court.

If an outlawed defendant cause the outlawry to be reversed, the plaintiff has till the end of the second term after reversing the same, and notice thereof given, to declare in. But if he do not proceed within two terms next after notice of reversing the outlawry, the defendant shall have costs, to be taxed by the prothonotary. Reg. T. 33 Car 2. C. B. Pract. Reg. 271.

But upon appearing and superseding the *exigent*, the plaintiff must declare within six or eight days after, otherwise the defendant may give him a rule to declare; and if no declaration come in within the limited time, the defendant may nonsuit the plaintiff, and have his costs taxed. Compl. Soll. C. B. 84. 2 Cro. Pr. 65.

Where an outlawry is not special, but in trespass *quare clausum fregit*, the defendant has a right to reverse it at his own expence, on entering a common appearance, and payment of costs; if before transcribing the outlawry into the Exchequer, on payment of costs up to the *exigent*; if after transcription, to the time of the reversal. Ashley v. Stockwell, M. 27 G. 2. Barnes, 324. Maughen v. Graham, Pract. Reg. 270.

In *Heeley* v. *Hewson*, where it appeared that, pending the *exigent*, the defendant was a prisoner in *York* gaol, the Court ordered the outlawry to be reversed *without* costs, upon defendant's entering a common appearance. P. 16 G. 2. Barnes, 321.

But if the process have been abused, or made subservient to the purposes of oppression, the Court will, on motion, order the plaintiff to reverse the outlawry at his own expence. B. R. H. 123.

Accordingly, where a man was outlawed, whilst ac- Anon. P. 1 W. and M. C. B. 2 Vent. 46.

Adlame v. Colebatch, P. 8 W. 3. C. B. Salk. 495. S. P.

tually in prison at the plaintiff's suit, the outlawry was ordered to be reversed at the charge of the plaintiff.

Seabroke and Howkin, B. R. T. 34 Car. 2. T. Jon. 211. S. P. Hill v. Wilks, B. R. T. 12 W. 3. 12 Mod. 413.

So the plaintiff will subject himself to the costs of reversing the outlawry, if he proceed in that way, where the defendant, being at large, never absconded, but appeared daily in public, and might have been readily served with process, or arrested.

However, though the defendant appeared publicly, if he eluded an arrest, the plaintiff shall not be compelled to pay the costs of reversal.

Holman v. Brazier, H. 12 G. 2. Barnes, 320.

Therefore, where it appeared, upon a rule to shew cause, why an outlawry should not be reversed at the plaintiff's expence, that two writs had been sued out, and defendant could not be arrested, for, living upon the confines of *Surry* and *Kent*, when a bailiff of the former county attempted to arrest him, he escaped into the latter, and so set the officer at defiance; the Court discharged the rule, saying, though it was sworn the defendant appeared in public, yet it was evident he kept out of the way to prevent an arrest.

Farnworth v. Smith, Barnes, 322. Dale v. Robinson, ibid. vide Potts v. Voyce, Pract. Reg. 272, 3.

So, in another case, a similar rule was discharged, though it was sworn that the defendant was a public visible man, and that no endeavours had been made to arrest him;—the affidavits as to the defendant's public appearance being fully answered, and it being also proved that he had absconded. The Court held that, in case of a total absconding, no endeavours to arrest are necessary.

MOTION that an outlawry upon a common *capias quare clausum fregit* should be reversed at the plaintiff's expence, on an affidavit of the public appearance and dealings of the defendant, sworn by himself only. The plaintiff's demand upon the defendant was below 40*s*. Rule enlarged till the following term, in order that the plaintiff's attorney might, in the mean time, make satisfaction to the parties. Bennett v. Sydenham, Barnes, 320. Vide S. C. Cas. Pr. C. P. 151.

An outlawry is reversable either by *motion*, founded on a plea, averment, or suggestion of some matter apparent upon the record, or, by writ of error, for any matter of fact, as death, imprisonment, &c.; it seems, however, to be discretionary in the Court to relieve by motion, or put the parties to a writ of error, according to the circumstances of the case; and of late years they have gone further than heretofore, on motion, the more effectually to expedite justice, save expence, and preserve the credit and reputation of the defendant. But where the defendant is driven to his writ of error to reverse the outlawry, either on coming in *gratis* upon the *exigent*, or upon being arrested on the *capias utlagatum*, he must, in all cases, pay the plaintiff his costs to the *outlawry*. The party, indeed, usually satisfies the plaintiff his debt as well as his costs, upon reversing the outlawry; as litigating the action is only attended with further expence. Vide Barnes, 324. 2 Cro. Pr. 55.

CHAPTER XIII.

CONTAINING OTHER CASES, AND GENERAL MATTERS, RELATING TO COSTS.

THERE are several material decisions upon the law of costs, which could not with propriety be introduced under any of the foregoing divisions;—the present chapter will, therefore, consist of such cases, and other general matters, relative to costs, as have not already been noticed in the course of this treatise.

Manners v. Pern, B. R. P. 12 Ann. 10 Mod. 156.

AN action of assault and battery was instituted in B. R. against a member of the university of *Cambridge*; of this suit the chancellor of that university claimed *cognizance*, but the claim, not being made until after general imparlance, was disallowed. And, under these circumstances, the plaintiff moved, that the defendant might pay all the costs occasioned by the motions about the cognizance. But the Court said they knew no precedent, nor saw any reason, that, because a third person claimed cognizance of pleas, and was refused, the defendant should pay costs. Motion rejected.

Player v. Bandy, B. R. T. 10 Ann. 10 Mod. 26. 4 Ann. c. 16.

IN an action of debt upon a bond, though the money was tendered before action brought, and was refused, the plaintiff must have costs. For the statute for the amendment of the

aw gives the court no jurisdiction until after action brought, and, therefore, they cannot take notice of a tender before.

THOUGH, in this case, the defendant confessed the trespass in his plea, the plaintiff replied, and issue being joined, a verdict, on the trial, was found for the defendant. Afterwards, however, notwithstanding the verdict, judgment was ordered to be entered for the plaintiff, and a writ of inquiry was executed. Upon which a question arose, what costs the plaintiff should have taxed upon signing final judgment?—and it was holden, that he should be allowed all the costs in the cause, except those of the trial. Broadbent v. Wilkes, T. 16 and 17 G. 2. Barnes, 133.

IN case there is judgment of nonsuit in an action brought by husband and wife, and one of them dies, the survivor is liable to the costs; and, *pari ratione*, whenever costs become due in an action by or against husband and wife, the survivor ought to receive them. If damages and costs are recovered in an action brought by husband and wife, and the husband die after final judgment, the widow is entitled to the costs as well as the damages, for these must always go together; and, consequently, as the executor of the husband is not entitled to the damages, he cannot be entitled to the costs. And it is equally reasonable, in an action against husband and wife, that the wife, in case she survive her husband, should receive the costs taxed under a rule of court, as that she should receive such as are due upon a final judgment;—because there is no difference, as to the obligation upon a woman, who survives her husband, to pay costs between such as are Tilt v. Bartlet and wife, B.R. P. 27 G. 2. Say. Rep. 126.

due under a rule of court, and such as are due upon a final judgment.

Crufee v. Berrie, In Error, B. R. M. 9 Car. 1 Ro. Abr. 516. pl. 1.

If in a joint action by husband and wife, a verdict be found for the plaintiffs, and the jury assess the damages, beyond the costs and charges expended by the husband about the suit, at so much, and those costs and charges, at so much, judgment that *both* the *baron* and *feme* shall recover the costs and damages will be good, though it was found that the husband alone was at the expence of the suit, for there cannot be one judgment for the costs, and another for the damages.

The *husband* cannot have execution for the costs, on a plea of coverture found for the defendant, without a *scire facias*.

Wortley, v. Rayner, B. R. P. 21 G. 3. Doug. 2 ed. 637.

Therefore, where on such a plea, in an action of debt upon a judgment, a verdict was found for the defendant, and a writ of *fieri facias* sued out for the costs, commanding the sheriff to levy and pay them to the defendant, *and her husband*, the Court set aside the writ, and proceedings thereon, for irregularity. Ashurst, *Justice*, said, the wife might have had process in her own name, because, the plaintiff having declared against her as sole, he was concluded from denying it.

Chamberlain and Hewitson, B. R. H. 7 W. 3. Ld. Raym. 73. S. C. 12 Mod. 89. Salk. 115. Holt, 99.

If a *feme covert* sue another woman in the spiritual court, for incontinence with her husband, and obtain a decree against the defendant with costs, the husband may release the costs; for since the husband is liable to the charges of

the suit expended by the wife, he shall have the costs in recompence; but if the husband die, they shall go to the wife, because they were a *chose in action*, and not to the representative of the husband. But where husband and wife are divorced *a mensâ et thoro* and the wife has alimony, and obtains a decree in the spiritual court, with costs, for defamation, or other injury, the husband, though the marriage still continues, cannot release the costs, because they come in lieu of what she hath expended out of her alimony, which is a separate maintenance, and not in the power of the husband.

5 Mod. 69. Vide etiam 3 Bulstr. 264. 2 Ro. Abr. 301. 1 Ro. Rep. 426.

The king's pardon will discharge any suit in the spiritual court *ex officio*; so it will discharge any suit in such court between party and party, which is only *pro salute animæ*, or *reformatione morum*, as for defamation, or for laying violent hands on a clerk, and such like; for such suits are not to recover damages, but only to correct the offender *pro salute animæ*, and are in truth the suits of the king, though prosecuted by the party. If, however, the party obtain a sentence and *costs taxed* in a suit in such court, even though it be only *pro reformatione morum*, or *pro salute animæ*, as for defamation, &c. the costs are not discharged by a subsequent pardon, for in them the party has a particular interest by the sentence, and the pardon only extends to the subject matter of the suit *quoad* any punishment. But if the pardon had been obtained *before* the sentence, there the pardon had discharged the whole, for then the court could not have proceeded to any sentence of the principal, and by consequence not of the costs, which are but accessary.

5 Co. 51. a. b. 3 Inst. 238. Cro. Jac. 335. Hob. 82. Sed vide Cro. Eliz. 684.

Hall's Case, 5 Co. 51. Banning v. Fryer, Cro. Jac. 159.

Watts's Case, Cro. Jac. 335. 2 Bulstr. 182.

Lewis v. Whitton, Noy. 85. W. Bendl. 186. S. C. Latch, 155. 2 Ro. Abr. 304. l. 40. Palmer v. Warner, Noy. 91. S.C. Latch, 190.

And it seems, that, though the time to which such pardon hath relation, be *subsequent* to the *award* of costs to the party, if it be *prior* to their *taxation*, it shall discharge them, because until the costs are ascertained by taxation, the party has no interest in them.

Contra Dr. Brickenden's Case, Cro. Car. 9.

Baldry v. Packard, Cro. Car. 46.

If the offence be pardoned after costs are taxed, and then the defendant appeal to a superior court, which gives new costs, whether upon the affirmance or reversal of the first sentence, they shall not be avoided by reason of the pardon, because they are not given in respect of the offence, but of the award of the former costs, which being taxed before the pardon, are not discharged by it, and, therefore, the appeal was proper for determining whether they were well given or not. But if the offence for which the suit was instituted in the spiritual court, be pardoned, pending an appeal, and such pardon relate to a time preceding the award of the costs, and after such pardon the appellant desert his appeal, and the spiritual court award costs against him in respect of such desertion, it seems that he may have a prohibition, because the pardon having discharged the costs of the first suit, as well as the offence, made the appeal to no purpose.

Lewis v. Whitton, 2 Ro. Abr. 304. W. Bendl. 186. Noy. 85. Latch, 155.

2 Hawk. P. C. 6 ed. 557.

It is said, that costs taxed to the party grieved for a contempt in a court of equity are not discharged by a general pardon of all contempts, because it is the common course of a court of equity to award such costs at the pleasure of the judge. But, in one case, the court inclined to think, that costs taxed by the prothonotary, upon an attachment for a

Anon, 2 Vent. 194. 2 Hawk. P. C. ubi supra.

misdemeanor, to the party grieved, were discharged by a general pardon of all contempts; for that they are not costs upon a judicial proceeding, but a kind of composition with the offender, who submits to pay costs to the injured party, to be relieved of the penalty for the contempt, and so not like costs taxed in suits in the ecclesiastical court *pro reformatione morum*, &c.

The Hundred of Lawress v. Shipman, C.B. T. 5 G. 2. Fitzg. 296. S. C. Pract. Reg. 203.

If, in an action against the Hundred, upon the statute of *Winton*, the plaintiff become nonsuited, the Hundred have a capacity to sue for the costs of the nonsuit, to which they are entitled under the statutes giving costs to defendants.

Rex v. Eyres and Bond, manucaptors of Hounce, B. R. T. 7 G. 3. 4 Burr. 2118.

In one case, the Court of *B. R.* granted a rule to shew cause, why the costs of the prosecutor should not be paid out of the money levied upon a *forfeited recognizance*. The circumstances were these:—the recognizance had been forfeited; a *scire facias* brought upon it; and a *levari facias* issued; and the sheriff returned 20*l.* levied of the goods and chattels of *Bond*; and that *Eyres* had not any goods, &c. whereof, &c. A motion was then made that the master of the Crown-office might be directed to tax the prosecutor's costs; and that they might be paid out of the sum levied.

Lord Mansfield.—Let the master tax the costs; and let notice be given to the defendant and the bail, to shew cause, why the costs so taxed should not be paid to the prosecutor; and the surplus of the money levied be returned to the defendant, or the bail, upon whom it was levied. This is the best and easiest method. The king has no interest in this money;—he is only a royal trustee for the party.

By the 3 *sect.* of the 10 *Geo.* 3. c. 50. (entitled, an act for the further preventing delays of justice by reason of privilege of parliament) after reciting, that the process by *distringas* is dilatory and expensive, it is enacted, "That the "court out of which the writ proceeds, may order the issues "levied from time to time to be sold, and the money arising "thereby to be applied to pay such costs to the plaintiff, as "the said court shall think just, under all the circumstances "to order; and the surplus to be retained until the defen- "dant shall have appeared, or other purpose of the writ be "answered."

Martin v. Townshend andSawbridge, B.R.P. 11 G.3. 5 Burr. 2725.

The Court will not discharge a rule for selling the issues levied upon a writ of *distringas*, though the defendant appeared before any issues were actually levied, except upon payment of the costs of issuing the *distringas*; for these costs are not to attend the event of the suit, but are to be paid to the plaintiff immediately, and at all events, whether he finally succeed in the suit or not.

The 10 *Geo.* 3. c. 50. relates to all writs of *distringas*, in general, and is not confined to such as are issued against members of parliament, or concern privilege of parliament only, as it's title and preamble seem to import.

Raban v. Plaistow, B. R. P. 11 G. 3. 5 Burr. 2726.

Therefore, where writs of *distringas* had issued against the succeeding sheriff, for not bringing in the body upon a *cepi corpus* returned by a former sheriff since gone out of office, the Court, on motion, ordered the issues to be sold; and the costs then incurred by the fault of the sheriff to be

taxed and paid to the plaintiff out of the money arising thereby; and the residue to be retained, in order to answer the event of the suit.

THE plaintiff in a foreign attachment shall not recover costs against the garnishee. Tross v. Michell, B. R. H. 32 Eliz. 1 Leo. 321. S. C. Cro. Eliz. 172.

So no costs are recoverable by the plaintiff in a writ of *audita querela*. Dy. 194.

IF the holder of a bill of exchange bring separate actions against the acceptor, the drawer, and indorsors, at the same time, the Court will stay proceedings in the action against the drawer, or against any one of the indorsors, upon payment of the amount of the bill, and the costs of that particular action; but they will not stay proceedings in the action against the *acceptor* but upon payment of costs in all the other actions, for the acceptor is the original defaulter, and against him all the costs occasioned by his default may be recovered. Smith v. Woodcock, B. R. P. 32 G. 3. 4 T. R. 691. Semb. cont. Golding v. Grace, C. P. H. 11 G. 3. 2 Bl. 749. Et vide Bayley, 42. n. (d).

IT is impossible to lay down any certain rule with regard to the allowance of costs upon motions in the courts of law. Costs on such occasions are arbitrary, and rest entirely on the determination of the Court, upon weighing all circumstances, both as to the *quantum*, and also whether there shall be any costs at all.

IN one case, the Court of Common Pleas refused costs, on

denying a rule to shew cause, though it was opposed in the first instance.

Waldron v. Norris, C. B. T. 11 G. 3. 2 Bl. 769.

As where, the defendant gave notice of an intended motion, which the plaintiff, for the sake of expedition, opposed in the first instance, without waiting for any rule to shew cause. The application appearing to be frivolous and ill-founded, the defendant took nothing by his motion. And it was holden by DE GREY, *Chief Justice*, and BLACKSTONE, *Justice*,—that the plaintiff was not entitled to the costs of this attendance. As the defendant took nothing by his motion, there cannot be a rule to pay costs, though when a rule *nisi* is discharged by a subsequent rule, costs may be added in that rule. It was in the plaintiff's election to appear or not in the first instance, and if, for expedition, he make his option to appear immediately, and oppose the granting of any rule at all, he purchases that expedition at the expence of his costs. But it seemed to GOULD, *Justice*, that the plaintiff ought to have these costs; else it would be in the power of any litigious party to plague the other with frivolous motions, and put him to perpetual expence. NARES, *Justice*, having been counsel in the cause declined giving any opinion. And so no rule for costs was made.

Golding v. Grace, C. B. H. 11 G. 3. 2 Bl. 749.

AND though a declaration may be delivered *de bene esse* in the Court of Common Pleas, on the return day of the writ, and it shall be good for many purposes; yet, being in favour of the plaintiff to expedite his cause, it cannot be delivered, so as to charge defendant with the costs of the decla-

ration, till the appearance day of the return. For the four days of grace are allowed to defendant to make an end of the cause by payment of the debt, or otherwise.

THE granting a trial at bar being a favour, the Court may lay the party applying for it, under the terms of paying *bar* costs, if there should be a verdict against him, and of receiving only *nisi prius* costs, if he should succeed.

Holmes, lessee of Brown v. Brown, B. R. T. 20 G. 3. Doug. 2 ed. 437. Vide 2 Str. 1121.

A PLAINTIFF being nonsuited, the defendant took out a *fieri facias*, and levied part of the costs, and, at the same time, took out a *capias ad satisfaciendum* for the rest, and took the plaintiff in execution, which being irregular, the Court set it aside with costs; the defendant upon this moved, that the proceedings against him, on account of these costs, should be stayed, upon his entering up satisfaction on the judgment obtained by him, for the sum at which the costs for the irregularity were taxed, and, upon shewing cause, the rule was made absolute.

Wills v. Crabb, P. 24 G. 2. B. N. P. 336.

IF bail above, or to the action, be not put in and perfected within the time limited by the rules of the court for that purpose, the bail-bond given to the sheriff upon the arrest, becomes forfeited, and the plaintiff may either take an assignment of it, or proceed against the sheriff, for not bringing in the body. But if he elect to pursue the former method, and bring actions against the bail on the bond, the Court will stay proceedings therein upon terms, among which the payment of the costs incurred by the assignment of the bail-bond, as taxed by the master, is always included.

Mitchell v. Gibbons, C. B. M. 29 G. 3. H. Bl. 76. Savage v. West, 9 G. 3. cited Cowp. 71. Orton v. Vincent, B. R. P. 14 G. 3. Cowp. 71. Barnes, 112.

BAIL below, or bail to the sheriff, are liable to pay the real debt to the plaintiff, though it should exceed the sum sworn to *and costs*, to the full extent of the penalty of the bail-bond. And the Court will not relieve such bail, even upon the *death* of the defendant in the original action, where the plaintiff might have had judgment against him, in case bail above had been put in and perfected in due time;—but if the defendant die before the plaintiff could possibly have had judgment against him, supposing that bail above had been regularly put in and perfected, the Court will stay proceedings on the bail-bond, on payment of *costs only*.

Willoughby v. Rhodes, T. 10 G. 2. Barnes, 70. Nutkins v. Wilkin, H. 29 G. 2. Barnes, 96.

So if the plaintiff in the original action die *before* judgment could have been recovered therein, the proceedings on the bail-bond shall be stayed on payment of costs; but if not till *after* judgment might have been obtained, his executor may proceed on the bail-bond, and the bail, before the Court will stay the proceedings, must pay both the debt and costs.

Walker v. Carter, C. B. P. 12 G. 3. 2 Bl. 816.

IN an action of debt upon a bail-bond, the defendant moved to stay proceedings, on the ground that he had paid his principal's whole debt, and his own costs, all but forty shillings, which he had tendered;—but the Court of Common Pleas, on considering precedents, held, that the costs of the actions against the principal, and the other bail, must also be paid, before proceedings could stay.

Peterken v. Sampson, B. R. M. 26 G. 3. Tidd's Pract. 131. n. (g)

BAIL above are not liable beyond the sum sworn to, and the costs.

Jackson v. Hassel, B. R. H. 20 G. 3. Doug. 2 ed. 930. Vide Reg. 23. E. 5 G. 1. B. R. n. (a) 2 Str. 922.

AND where the plaintiff, out of the penalty of a recognizance of bail, levied not only the money recovered, but some costs, not included in the judgment, but such as he had really been put to; it was holden, that though equitable costs may be levied out of the penalty of a bond, yet it was too hard to suffer it to be done against the bail; and the overplus money was ordered to be returned.

Baldwin v. Morgan, B. R. H. 2 G. 2. 2 Str. 826. S. C. 1 Barnard. K. B. 125.

BAIL, in the original action, are not liable to the costs of a writ of error brought in the Exchequer-chamber, upon which the judgment is affirmed;—for their engagement extends no further than to the judgment in the court below.

Penruddock v. Errington, Cro. Eliz. 587. S. P. Smith v. Faldo, Cro. Jac. 636.

BUT where the bail, after judgment on a *scire facias* against them, moved to stay execution, the principal having brought error, and they undertaking to pay the condemnation money and the costs on the *scire facias* in four days after affirmance, the Court, there being, in this case, no bail on the writ of error, made the bail in the original action, undertake to pay the costs of the writ of error also, in case the judgment was affirmed; saying, it was a favour they were asking, and they should therefore submit to equitable terms.

Ritson v. Francis, B. R. M. 4 G 2. 2 Str. 877. S. C. 1 Barnard. K. B. 373.

AN attachment had been granted against Mr. *Plunket*, upon the application of Sir *Thomas Frederick* (the plaintiff in an action brought by him against Mr. *Lookup*), for Mr. *Plunket*'s not appearing to give evidence, in obedience to a *subpœna* regularly served upon him. Mr. *Plunket* swore, upon his examination, that Sir *Thomas* had undertaken to

Rex v. Plunket, Esq. B. R. T. 2 G. 3. 3 Burr. 1389.

give him further notice, if it should be necessary for him to attend; but that Sir *Thomas* neglected to do it. And he swore, that he had been *subpœnaed* on a former intended trial of the same cause, and had then attended, but the trial did not come on. He further swore, that he would have attended, if he had received such further notice from Sir *Thomas* to do so. Whereupon the master of the Crown-office reported, that he had cleared himself of the contempt.

THE Court, after declaring it to be contrary to their general course and practice to give costs to persons who had purged themselves of contempts upon their examination, in consequence of attachments which had been granted against them by the court, on cause shewn, thought that it ought to be done in this particular instance; because the prosecutor must, within his own knowledge, be satisfied that this complaint was ill-founded and vexatious. They, therefore, ordered costs to be paid by Sir *Thomas* to Mr. *Plunket*.

Reg. B. R. M. 23 G. 3.

IN all actions in the King's Bench, in which the plaintiff shall proceed against the defendant by special original writ, and shall recover less than the sum of fifty pounds, he shall not, on taxing costs, be allowed any more or other costs than he would be entitled to in case he had proceeded by bill; except in such actions in which he could not proceed by bill, or in which any defendant shall be actually outlawed.

Lewis v. Piercy, C. B. T. 28 G. 3. H. Bl. 29.

WHERE a debt arises before, but a verdict is obtained, and the costs taxed, after the bankruptcy of the defendant, though

previous to the allowance of his certificate, the costs relate to, and are considered as part of the original debt, and the certificate extends to both.

Graham v. Benton, 1 Wils. 41. Blandford v. Foote. Cowp. 138.

And if a creditor obtain a verdict before the issuing of a commission of bankruptcy against the defendant, he is entitled, notwithstanding final judgment should not be signed till after the commission was taken out, to prove his *costs* as well as his debt; for the costs *de incremento*, when taxed, are annexed to those assessed by the jury upon the verdict, and become consolidated with them by a fair and equitable relation of law.

Aylett v. Harford, C. B. T. 19 G. 3. 2 Bl. 1317.

And there is no distinction, with regard to this point, between an action of debt or *assumpsit*, and for a *tort*, where a judgment follows the verdict. Accordingly, where in an action for words, the plaintiff obtained a verdict, with 10*l.* damages. The defendant, between the verdict and judgment, became a bankrupt, and was, afterwards, taken in execution upon the judgment. It was moved to discharge him out of custody, upon the authority of the cases of *Graham* v. *Benton*, *Blandford* v. *Foote*, and *Aylett* v. *Harford*.

Longford v. Ellis, B. R. P. 25 G. 3. Cooke's Bank. Laws, 2 ed. 227. S. C. H. Bl. 29. n.

Against the motion, it was insisted, that the cases cited were founded on actions brought for an existing debt, at the time of bringing the action; which was not the case here, for even, at the time of the bankruptcy, there was nothing but a mere right to recover damages.

But the Court held, that there was not, as to this parti-

cular, any distinction between a *tort* and a contract; and the rule, for discharging the defendant, was made absolute.

Cited 3 Wils. 270. 1 Atk. 140. acc. Sed vide 4 Burr. 2445. where it is said, that this case was afterwards overruled by Lord *Northington*, in a case *ex parte* Talbot.

But this point is said to have been ruled differently in a case *ex parte Todd*; which was ejectment, wherein a verdict was given for the plaintiff at the summer assizes, with nominal damages; in the succeeding vacation the defendant became a bankrupt, and in the next term the plaintiff signed final judgment, and had costs *de incremento* then taxed and allowed to him. Lord Henley held, these costs did not become a debt till the judgment, and were connected therewith, and that the plaintiff could not be permitted to prove the same, as a debt under the commission.

Ex parte Sneaps, March 4, 1782. Cooke's Bankr. Laws, 2 ed. 236.

Costs in equity do not become a debt till after they are taxed. Thus, where one *Sneaps* was committed for a contempt in nonpayment of costs, which were taxed subsequent to his bankruptcy, but the order for the taxation was made before it; upon a motion for his discharge, upon the ground of the debt being discharged by his certificate, it became a question, whether this was to be considered as a debt arising *anterior* or *posterior* to the bankruptcy?

The Lord Chancellor observed, it is generally true that where several distinct acts are necessary for the completion of any business, the completion refers to the inchoation. But the question is, whether the making an order can be considered as such inchoation? And he said, he thought it clearly could not. That it might as well be said, the damages assessed in trespass are to have reference to the trespass

which they certainly have not, for they have their origin in the judgment. He took it to be clear, that in all instances in the Court of Chancery, the *taxation* constitutes the demand; and as the taxation was subsequent to the bankruptcy, the debt is so, and, consequently, he could not discharge the bankrupt.

THE courts have always strongly discountenanced an unnecessary prolixity in pleading; and where a party extends the pleadings in a cause merely with a view to harass his antagonist, he will besides, sometimes, drawing down upon himself a heavy censure from the court, generally, subject himself to the costs incurred by the superfluous parts of the record, which the court will order to be struck out. Vide Cowp. 665, 727. Dougl. 2 ed. 194, 667.

ON a reference to the master, to report through whose fault the pleadings were extended to so enormous a length, he reported this to be an action of trespass, battery, and false imprisonment, against eight defendants, commenced A. D. 1751. That in the declaration there were three counts for the trespass, and two for false imprisonment: that there were twenty-seven several pleas of justification by these several defendants; which, with replications, traverses, novel assignments, and other engines of pleading, amounted at length to a paper book of near two thousand sheets. He was of opinion that the fault lay principally in the length and intricacy of the declaration; the action being only brought to try, whether the freeholders and copyholders of the manor of *Ellerton*, in *Yorkshire* (whereof *Luke Robinson*, Esq. a barrister, was Yates v. Carlisle and others, B. R. H. 1 G. 3. 2 Bl. 270.

lord, in right of his wife) were entitled to common in a ground called the Inclosure. That the declaration was so catching, by running changes upon the several defendants, and the several names of this ground, that it was necessary for the defendants to guard every loop-hole, which made their pleas so various and so long. That *Robinson* had declared, he had drawn the declaration in this manner on purpose to catch the defendants, and that he would scourge them with a rod of iron. That in another cause, for the same question, brought against the same defendants (in *Robinson*'s own name) the art was so far improved, that the paper book would amount to three thousand sheets.

Robinson, in *propriâ personâ*, shewed cause against this report; and insisted, he had a right to do what he had done, and that he thought the whole declaration necessary. The court strongly inclined to fix some heavy censure on him; but desired, that previously the question of right might be tried.

1 Bl. 291. THE cause, accordingly, went down to trial on a feigned issue, *Carlisle* being plaintiff, and *Robinson* defendant. But the defendant *Robinson* made default at the assizes, and a verdict was had against him. And now, upon motion, and solemn argument, the Court directed this verdict to be entered of record, and all the costs incurred in every stage of proceeding (which amounted it was said to near 1000 *l.*) to be paid by *Robinson*.

HOWEVER, though a plaintiff should insert more counts in his declaration than are necessary, the court will not order him

to pay costs, where that mode of declaring is sanctioned by the general practice, in such cases.

Accordingly, where the master reported that the declaration, which was upon a policy of insurance, consisted of seven counts; 1st. for a *total* loss, on a policy subscribed by the defendant himself; 2d. for an *average* loss, on a policy subscribed by the defendant himself; 3d. for 6 *l. per cent.* to be returned (it being averred, that the ship departed with convoy), on a policy subscribed by the defendant himself; 4th, 5th, and 6th, exactly the same with 1st, 2d, and 3d, (respectively) with this difference only, that these three last counts alleged the policy to have been subscribed by one M. F. S. the defendant's then agent, factor, or servant, in that behalf by him duly authorized, appointed, and deputed, for that purpose; 7th, for money had and received to the plaintiff's use. The master thought, that four counts were sufficient; viz. either the three first, with the last; or else the 4th, 5th, and 6th, together with the last. Nicholson v. Croft, B. R. T. 1 G. 3. 2 Burr. 1188.

Lord Mansfield said,—it was unnecessary to declare double, with respect to the signing of the policy, that is to say, once as upon a policy signed by the defendant himself; and again, as upon a policy signed by his agent, for him. That the better way was to declare according to the truth, which was, upon a policy signed by S. as agent for the defendant, duly authorized by him in that behalf.

The Court ordered the three first counts to be struck

out, but without the payment of any costs, as this manner of declaring was said to be usual.

Anon. C. B. H. 28 G. 2. 2 Wils 20.

If indecent or scandalous expressions are unnecessarily introduced into a declaration, the court will, on motion, order the words to be struck out, and inflict exemplary costs on the offending party.

The King v. May, B. R. P. 19 G. 3. Doug. 194.

Where a clerk of the peace, in drawing an indictment, inserts unnecessary recitals, the court will make him pay costs. Thus where, in an indictment for perjury, which had been removed by *certiorari*, from the quarter sessions for *Middlesex*, all the continuances on the former prosecution, &c. were stated, which are rendered unnecessary by the 23 *Geo.* 2. c. 11. s. 1. the court ordered that it should be referred to the master, to see what part of the record was unnecessary, and that the clerk of the peace should pay the expence incurred by such unnecessary part.

The King v. Adams, T. 5 G. 2. 2 Barnard, K. B. 1.

In one case, a motion was made for a rule upon the clerk of the peace of the city of *London* to pay the costs, which he had occasioned by returning an indictment with a caption *anno quarto*, instead of *anno tertio*, upon a *certiorari* to the sittings of *nisi prius* at *Guildhall*, by means of which the defendants were acquitted there. Accordingly the Court made a rule to shew cause.

B. N. P. 88.

Where an action of trespass is brought for the recovery of mesne profits after a judgment by default, in an ejectment

against the casual ejector, it is usual for the plaintiff to recover the *costs* of the ejectment, as well as the mesne profits.

But, in the following case, though the jury did not include the costs of the ejectment in their verdict in an action for the mesne profits, the court refused to set it aside. The circumstances were these; the defendant suffered judgment to go by default in this action, which was trespass for mesne profits after a recovery in ejectment. On executing the writ of inquiry, the jury gave their verdict for the rent of the premises, but did not include the costs of the ejectment. The defendant became a bankrupt after the judgment in ejectment, and before the present action was brought. A rule having been obtained to shew cause why the inquisition should not be set aside, because the jury had not given the costs of the ejectment in their damages.

Gulliver v. Drinkwater, B R. H. 28 G. 3. 2 T. R. 261.

Ashurst, *Justice*, said,—This is an application to the discretion of the Court to set aside the inquisition, because the damages given by the jury are too small. There is no doubt but the plaintiff had another remedy for the costs of the ejectment; for being a liquidated debt, he certainly might have proved it under the commission. And as he has neglected to do that, and chosen to take the chance of recovering in an oblique way more than he could have recovered in a direct manner, and has failed, I own I am not disposed to assist him. Though in many instances, in actions of trespass for mesne profits, the jury take into consideration the costs incurred in recovering the possession by ejectment, yet it does not appear to me, under all the circumstances of this case, that they were

bound to do so here. For the statutes relative to bankrupts were made for the benefit of unfortunate persons, who, in giving up their whole substance for a fair and equal distribution among their creditors, are entitled to be discharged of all debts due previous to their bankruptcy.

GROSE, *Justice*.—This is like a motion for a new trial, which is made to the discretion of the Court. Although the jury might, if they had pleased, have given the costs of the ejectment as consequential damages in their verdict in this action, yet, as the plaintiff might have proved his debt for the costs under the commission of bankrupt which has issued against the defendant, I do not think that the jury, in not including those costs in the damages, have so far done wrong, as to induce us to interpose, and set aside the inquisition. Rule discharged.

Turner v. Barnaby. Salk. 259. S. C. Holt, 266. Vide Barnes, 182.

IF the defendant, on the trial, in an action of ejectment, do not appear, and confess lease, entry, and ouster, the plaintiff, on the return of the *postea*, upon which the cause of the nonsuit is endorsed, is entitled to judgment against the casual ejector. And, afterwards, on application to the proper officer, he will tax the plaintiff his costs upon the consent rule; and if the defendant refuse to pay the same on demand, the court will on affidavit thereof, grant an attachment against him.

Goodright v. Tregurtha. Barnes, 112.

UPON the trial, in an ejectment, one of the defendants confessed lease, entry, and ouster, and a verdict was found against him for one third of the tenements in question. The other defendant did not confess; and against him the plaintiff

moved for costs, which, in this case, he could not have upon the common rule by consent. The court made a rule to shew cause, which was afterwards made absolute, no cause being shewn.

VERDICT against defendant A. who, on the trial, appeared, and confessed lease, entry, and ouster; the other defendants did not appear and confess; therefore they, as usual in such case, were found not guilty. Plaintiff obtained leave to sue out an *habere facias possessionem* on the judgment against the casual ejector, as to the latter defendants, and got his costs taxed on the *postea*; for which costs he thereby could only have remedy against defendant A. He then moved, that the prothonotary should tax his costs against B. (one of the defendants who did not appear and confess) on the common rule by consent entered into for him; whereon a rule was first made to shew cause, and afterwards absolute. Thrustout v. Foot and others. Barnes, 149.

IF the lessor of the plaintiff, in an ejectment, die before the commission day of the assizes, and the plaintiff be nonsuited at the trial, by reason of the defendant's not confessing lease, entry, and ouster, the executor of the plaintiff's lessor is not entitled to have any costs taxed upon the common consent rule, it being merely personal; and if there had been a verdict for the defendant, in this case, he could have had no costs. Thrustout v. Bedwell. 2 Wils. 7.

BUT where the lessor of the plaintiff died after the trial of the cause, the costs, taxed upon the common rule by consent, Goodright v. Holton. Barnes, 119.

were ordered to be paid by the defendant to his personal representative.

If the plaintiff obtain a verdict in an ejectment, he may have a *capias ad satisfaciendum*, or a *fieri facias*, for the costs, and an *habere facias possessionem* for the possession separately; or an *habere facias possessionem*, with a *capias ad satisfaciendum*, or *fieri facias*, for the costs in one writ.

2 Cro. Pr. 205. Imp. K. B. 3 ed. 443.

And where, in this action, a verdict is found for the defendant, or the plaintiff is nonsuited for any other cause than the defendant's not confessing lease, entry, and ouster, the defendant must proceed to tax his costs on the *postea*, as in other actions, and sue out a *capias ad satisfaciendum* against the plaintiff: and if, upon shewing this writ under seal to the lessor of the plaintiff, serving him with a copy of the rule by consent, and demanding the costs, he do not pay them, the court will, on an affidavit of the facts, grant an attachment against him.

Imp C. P. 3 ed. 603.

But it is unnecessary to make out a *capias ad satisfaciendum* against the plaintiff in the Common Pleas; for in that court, after a defendant in ejectment has obtained a verdict, or the plaintiff has been nonsuited upon evidence at the trial, the practice is for the prothonotary, after taxing the costs upon the *postea*, to mark them upon the common rule; which must be shewn to, and, at the same time, a demand made of the costs upon, the lessor of the plaintiff personally, either by the defendant, or by his attorney on record, named in the consent rule; and if upon affidavit of

such demand, and of the lessor of the plaintiff's refusal to pay the costs, in which it seems both the defendant and his attorney ought to join, an attachment may be obtained.

BUT where the lessor of the plaintiff was a peeress, the Court refused to grant an attachment against her person, for nonpayment of the costs taxed after a verdict for the defendant, upon a trial at bar, but ordered her to shew cause, why an attachment, as to her goods and chattels, should not be issued; which rule was afterwards made absolute.

Thornby ex Dim. Duke and Duchess of Hamilton v. Fleetwood, Cas. Pr. C. P. 7.

EACH defendant is answerable for the whole costs;— therefore in an ejectment against several, where the defendants defended severally, at the assizes one confessed, and had a verdict against him, the others did not confess. The Court, upon application, said, the officer must tax the same costs against all the defendants; and if, after the plaintiff has had satisfaction against one, he should take it against another, such defendant may apply to the Court.

Wilson v. Foot and others, B. N. P. 335.

UPON the trial of a cause, the parties entered into a rule by consent, that a verdict should be found for the plaintiff, which was only to stand as a security, and a point of law was reserved for the opinion of the Lord Chief Justice, and if he should be of opinion for the plaintiff, then the verdict was to stand, and if he should be of opinion for the defendant, then the verdict was to be void, and the plaintiff was to pay the defendant the costs of a nonsuit. The rule of *nisi prius* was made a rule of court; and, afterwards, the point reserved being determined in favour of the defendant, the costs of a non-

Hammond v. Woolmer, Pract. Reg. C. P. 116. S. C. Cas. Pr. C. P. 113. Barnes, 28. 120.

suit were taxed upon the rule. Subsequent to this taxation the defendant died, and it was resolved, that his executor was entitled to the costs, and an attachment was granted against the plaintiff for not paying them.

Hayes v. Thornton, Barnes, 122. Sed vide 2 Str. 874.

So where the defendant died after having obtained a rule against the plaintiff for costs, but before the same were paid, the Court held the administratrix of the former entitled to the money, and granted an attachment against the plaintiff for nonpayment thereof.

A GROSS sum may be assessed by the jury, in their verdict, for damages and costs, because the word *damna* in it's largest sense includes costs, they being a damage to the plaintiff; or damages and costs may be assessed separately.

IN the former case, however, the plaintiff cannot have judgment beyond the amount of the damages laid in his declaration, because the damages and costs being entirely assessed, *non constat* how much is given for the one, and how much for the other, and the jury may, possibly, have given greater damages than the plaintiff has declared for. Thus if, in trespass, the plaintiff declare to his damage of twenty marks, and the jury assess the damages and costs of suit jointly to twenty-two marks, he can have judgment only for twenty marks, the damages mentioned in his declaration.

Yearb. 13. H. 7. 16, and 17. 10 Co. 117. b. Cro. El. 568. 1 Ro. Abr. 578. pl. 11.

BUT by assessing them in distinct sums, the jury may give damages to the extent of what the plaintiff has declared for, and also costs of suit, though together they may exceed the

Pilfold's Case, 10 Co. 116. S. C. Cro. Jac. 297. Jenk. Cent. 288.

damages laid in the declaration. Accordingly, in an action of trespass, the plaintiff alleged his damages to be forty pounds; and, at the trial, the jury found a verdict for the plaintiff, and assessed 49*l.* for damages, and 20*s.* for costs. The plaintiff entered a *remittitur* for 9*l.* parcel of the damages, and prayed judgment for 40*l.* the damages declared for, with increase of costs. And, costs *de incremento* having been taxed at 9*l.* judgment was afterwards entered for 50*l.* Upon this the defendant brought a writ of error in the Exchequer-Chamber, and assigned for error, that the damages and costs together amounted to more than the damages alleged in the declaration. But after much consideration, the judgment was affirmed.

1 Ro. Abr. 578. pl. 9. S. P. Cro. Eliz. 544. 568. 866. Cro. Jac. 69. Yelv. 70. Contra 2 Inst. 288.

If the costs assessed by the jury be omitted in the entry of the judgment, it will be error. And where the costs *de incremento* were, in the entry of the judgment, said to be assessed *per juratores*, instead of *per curiam*, it was held to be error. But, if judgment be given for the damages and costs assessed by the jury, the want of judgment for costs *de incremento* is not error.

Haynes v. Guy, Yelv. 107. Bistop's Case, 1 Ro. Abr. 205. pl. 2.

Goose v. Penton, 3 Keb. 394.

Costs *de incremento* ought to be said to be given *ad petitionem querentis*; and, formerly, if these words were omitted, or even misplaced, in the judgment, it was error. But, by the 16 and 17 *Car.* 2. c. 8. s. 1. no judgment after a verdict in any action, or upon a nonsuit in replevin, shall be stayed or reversed, for that the increase of costs are not entered to be at the request of the party for whom the judgment is given; nor by reason that the costs in any judgment what-

Good's Case, Poph. 211.

Et vide 4 Ann. c. 16. s. 2.

soever are not entered to be by consent of the plaintiff; but such omissions, defects, and all other matters of a like nature, not being against the right of the matter of the suit, nor whereby the issue or trial are altered, shall be amended by the court where such judgments shall be given, or into which the record shall be removed by writ of error.

And, in an action of debt, if there be no writ of inquiry to ascertain the damages sustained by the detention of the debt, the damages assessed by the Court, as well as the costs of the suit, should, in the judgment, be stated to be given with the assent of the plaintiff; but the omission of such statement, it should seem, is aided by the 16 and 17 *Car.* 2. or, at least, may be supplied at any time. Accordingly, in *Tully* v. *Sparkes*, which was an action of debt upon bond, and judgment for the plaintiff upon a demurrer to the defendant's plea, the Court of King's Bench permitted the words *ex assensu* to be inserted in the judgment after a writ of error had been brought, and argued, in the Exchequer-Chamber.

2 Str. 868. S. C. 2 Ld. Raym. 1570. 1 Barnard. K. B. 325. 335. Vide Comb. 220.

So, if a manifest miscomputation, or any plain mistake in figures, should appear on the face of the record, with regard to costs, it may be amended; as, for instance, if the damages are said to have been 60*l.* and the costs 30*l.* which amount in the whole to 100*l.*

4 Burr. 1989. 1 Ro. Abr. 205. pl. 5.

It is said, that, if a judgment be entered up with a blank for the costs, they cannot be afterwards inserted.

7 Mod. 129.

If the jury assess costs in a case, wherein none are recover-

Green v. Cole, 2 Saund. 257.

able by law, the judgment should be entered *nullo habito respectu* to such costs.

THE jury ought *ex officio* to give costs in an action in which costs are recoverable by law, but if they omit or refuse to do so, the Court will, on motion, order costs to be taxed, and endorsed on the *postea*.

Stores v. Tong, Cas. Pr. C.P. 7. Ward v. Snell. H. Bl. 10. Vide 1 Lill. Abr. 472. E.

IN an action of *assumpsit*, the plaintiff declared upon two several promises; plea *non assumpsit*; and, at the trial, a verdict was found for the plaintiff, and several damages assessed, with entire costs. A writ of error being brought, the judgment was reversed as to one promise, and affirmed as to the other, and the *entire* costs.

Grymston v. Reyner, Cro. Eliz. 537. S.C. Moore, 708.

So, in a subsequent case, in which the plaintiff declared upon two sets of scandalous words, spoken at different times, and obtained a verdict with several damages, upon which one entire judgment was given for damages and costs. One set of the words not being actionable, the judgment, on error brought in the Exchequer-Chamber, was reversed *quoad* the damages for those words, and affirmed for the other damages and entire costs.

Jacob v. Miles, Cro. Jac. 343. S. C. 1 Ro. Rep. 24. Jenk. Cent. 339. Hob. 6. Contra, Cro. Jac. 424.

IT is a settled and established rule, that the statutes which give costs, are not to be extended beyond the letter, but are to be construed strictly.

Salk. 206. Carth. 179. B. R. H. 357. 2 Str. 1006. 3 Burr. 1284.

THE Court will grant an attachment against a party for

1 Lill. Abr. 475. B.

nonpayment of costs taxed under a rule of court; for it is a contempt of court not to obey the rules thereof. But, in order to obtain this attachment, an affidavit must be produced, stating that the costs were demanded, either by the party entitled to receive them, or some person by him duly authorized, and that payment was refused.

Barnes, 120. Say. 48. 1 Burr. 651. 5 Burr. 2686.

A DEMAND of costs must be made at the time of serving the rule; and an attachment for nonpayment of costs, taxed and liquidated, will be granted in the first instance, without making a rule to shew cause; and may be moved for on the last day of a term.

THE costs allowed to a plaintiff after obtaining judgment in an action on a simple contract, or for a debt certain, only extend to the time of signing final judgment. In such case, the expences of levying, (1) together with all other incidental charges of the execution, must be paid by the plaintiff and not by the defendant; for the sheriff can only levy on the defendant the sum which is given by the judgment. But if the judgment be for a penalty, the plaintiff has a right to receive the whole of his debt, independent of the expences of the execution, which, in that case, must be sustained by the defendant. A defendant, if he prevail, and take out execution for the costs, is in the same predicament, for he can

2 T. R. 157.

(1) In *Woodgate* v. *Knatchbull*, B. R. M. 28 G. 3. 2 T. R. 148. it was holden, that the sheriff is not entitled, in point of strict law, to take any other charge for levying upon an execution, than the poundage, allowed by the statute of 29 *Eliz.* c. 4.

only levy the amount of such costs, and that, at his own expence.

It was anciently the practice for the Court, or one of the judges, to tax the costs, and make a special rule for their payment; upon service of which, and refusal of payment, an attachment issued against the refractory party. But, at this day, costs are taxed, in the King's Bench, by the master, and, in the Common Pleas, by one of the prothonotaries, upon the attornies or agents of the parties attending them at their respective offices for that purpose. After the taxation, the master or prothonotary, marks the amount of the costs on the *postea*, inquisition, or demurrer-roll, as the case may be, when final judgment is said to be signed, and the successful party may immediately take out execution. Gilb. H. C. P. 261. 266.

Where any extraordinary costs have been incurred in a cause, and generally in country causes, an affidavit (in which it is customary for the party entitled to the costs, and his attorney to join) stating the particulars of such extra expences, is requisite to enable the proper officer to make an adequate taxation. And it is said, that more than ordinary costs ought not to be taxed until the attornies on both sides have been heard for their clients, and an affidavit of the costs produced, except, where one of the attornies, having had notice of the intended taxation, neglects to attend. It is usual to give such notice to the attorney or agent of the party liable to the costs; but as this is a matter of courtesy, and not of right, it may be prudent, in some cases, to take out a rule from the 1 Lill. Abr. 470. I.

office of the clerk of the rules, in the King's Bench, or from that of the secondary, in the Common Pleas, to be present at the taxation, which, when served on the opposite party, renders it incumbent on him to give notice.

THE END.

TABLE

OF THE

PRINCIPAL MATTERS.

A

ABATEMENT. *Vide* JOURNEIS ACCOUNTS, No. 1, 2.

1 A DEFENDANT is not entitled to costs, where there is a default in the original writ, and the plaintiff is afterwards nonsuited page 131
2 Nor where there is a plea in abatement, which the plaintiff confesses, and enters a *nil capiat per breve* - ibid.
3 But defendant shall have costs if issue be taken on such plea (No. 2), and the plaintiff be afterwards nonsuited at the assizes ibid.

ADMINISTRATOR. *Vide* EXECUTOR.

ADMIRALTY.

1 Costs are recoverable in an action on the 2 *H.* 4. c. 11. for having been wrongfully impleaded in a court of admiralty, for a thing done upon land - - - 8. 475

AGREEMENT.

1 In writing to pay *debt and costs*, generally, extends only to costs as between party and party - 424

AMENDMENT. *Vide* FORMA PAUPERIS, No. 8.

1 A fine was imposed, at common law, on either the party or pleader, for leave to amend defective pleadings 345
2 But now, generally speaking, the respective parties in a suit may obtain leave to amend on payment of costs - 347
3 By which, however, must be understood such costs only as the other party must *necessarily* incur by the amendment 348
4 And in some instances the courts have granted leave to amend *without* costs - - 349
5 Costs upon the amendment of a special verdict 351
6 Writs of error, wherein there shall be any defect, shall be amended by the respective courts in which they are returnable, 5 *Geo.* 1. c. 13. 351
7 And it should seem, that writs of error may be amended without costs 352
8 Upon what terms the court will, after error brought, permit the defendant therein to amend the record 352

APPEAL. *Vide* SESSIONS.—CONSTABLE.

ARBITRATION. *Vide* COURT OF CONSCIENCE, No. 16.

1 An arbitrator, in a cause referred by rule of court, may award costs without any express authority for that purpose 413
2 And he may award that one of the parties shall pay to the other *costs to be taxed by the master, or prothonotary* 414
3 But he cannot award such costs to be paid, as shall be taxed by persons named in the award, who are not officers of any court ibid.
4 Yet an award of costs *generally* is good, for then they will be referred for taxation to the proper officer 415, 418
5 Arbitrators may award a gross sum for costs 417
6 An award, *directing the charges in such a suit*, or the *charge of a suit then depending, of which the other party should deliver a bill*, to be paid, has been held good - 418
7 But an award to pay *all the expences of a suit, and all reasonable expences sustained circa sectam prædictam*, or that the defendant should pay to the plaintiff or his attorney, such costs as plaintiff was liable to pay of two other actions, is bad - 419
8 Arbitrators, appointed under an order of *nisi prius*, have a power to award costs after the order; but if appointed under a bond, it is otherwise - - ibid.
9 And, if appointed under an order of *nisi prius*, they may award the costs of the reference; but should they only award *costs* to be taxed generally, no more than the costs of the suit shall be allowed ibid.
10 So an award that one party shall pay the *costs sustained by the other in the action*, will not include the costs of the reference 420
11 If, upon referring a cause under an order of *nisi prius*, a verdict be taken for plaintiff in a certain sum, as a security for what shall be awarded and costs, the arbitrators cannot make an award in his favour, *without* costs - - ibid.
12 And an arbitrator, under an order of *nisi prius*, can allow costs only as between party and party, and not as between attorney and client, unless the order authorize him to give what costs he may think proper 421
13 Where a cause is referred by an order of *nisi prius*, and the costs directed to abide the *event*, that must be taken to mean the *legal event*, and, in such case, the costs are not in the discretion of the arbitrator, but must follow the rule of law 424
14 So that if, in such case (No. 13), an arbitrator award to the plaintiff damages below 40*s.* in a species of action in which he could not, on a verdict with damages under that sum, have had full costs without a judge's certificate, the plaintiff cannot have more costs than the damages given by the award - ibid.

ARREST OF JUDGMENT. *Vide* JUDGMENT, No. 2.

ASSAULT AND BATTERY. *Vide* DAMAGES, No. 12, 13, 14, 15, 16, 17—CERTIFICATE, No. 2.

1 If, in this action, the jury give damages under 40*s.* the plaintiff cannot have full costs, unless the judge certify that *both* an assault and battery were proved. 22 *Car.* 2. c. 9. 149

2 Neither an action for beating plaintiff's servant, *per quod servitium amisit*, nor for criminal conversation with his wife, is within this statute 47
3 Where another trespass, not within the 22 *Car.* 2. c. 9. is stated as a substantive and independent injury in a declaration in assault and battery, and a general verdict found for plaintiff, a certificate (No. 1) is unnecessary to entitle him to full costs, although the damages be found under 40*s.* - 48
4 What shall be deemed to amount to such a separate injury, as will, on a general verdict for the plaintiff, supersede the necessity of a certificate - ibid.
5 Whether a plaintiff shall have full costs without a certificate, where the declaration, in an action of assault and battery, states an injury to the plaintiff's clothes - 54
6 No certificate is necessary to give a title to full costs, where the defendant pleads a justification, though the damages should not amount to 40*s.* - - 62
7 Unless the plaintiff should, in such case (No. 6), make a new assignment, to which defendant pleads not guilty ibid.
8 *Query*—Whether the plea of *molliter manus imposuit* is such an admission of an assault and battery as renders a certificate unnecessary 63
9 Where a defendant justifies the *assault only*, and the damages are found under 40*s.* the plaintiff cannot have full costs without a certificate ibid.

ASSIZE.

1 Defendant cannot have costs upon a nonsuit in an assize 131

ASSIZE, CLERK OF,

Whether a clerk of assize has a lien on the records of the court for his fees - 414. n. (1)

ATTACHMENT. *Vide* COSTS, No. 12, 13.

ATTAINT.

1 No costs in an action of attaint - 7. 130

ATTORNEY. *Vide* COURT OF CONSCIENCE, No. 17, 18. 21.

1 Where a party in a suit is made liable to pay, or has actually paid, costs, through the gross negligence, ignorance, or misbehaviour of his attorney, the court will order such attorney, in the former case, to pay the costs instead of his client, and, in the latter, to reimburse him 482, &c.
2 If the plaintiff's attorney neglect to produce his client, pursuant to a judge's order, in consequence of which judgment of *nonpros* is signed, and plaintiff cannot be found, the attorney shall pay costs to the defendant - 487
3 An attorney must proceed in a suit commenced on the credit of a client, though the client should not furnish him with money ibid.
4 An attorney having not only joined in an affidavit to support a frivolous complaint against a justice of the peace, but also used expressions indicating personal ill-will towards defendant, the court ordered him, as well as his client, to pay costs 488

5 In an affidavit of service, a petition being recited *verbatim*, the chancellor ordered the attorney to pay costs 489
6 Although the name of a plaintiff in an ejectment be the same as that of a real person residing in the same town with the attorney for the plaintiff, yet if such name was used purely as fictitious, the attorney is not personally liable to costs 490
7 By 3 *Jac.* 1. c. 7. s. 1. no attorney shall be allowed for fees to counsel, &c. without a ticket under the hand of such counsel, &c. testifying the sums received, &c.; and every attorney shall deliver a true bill of charges, subscribed with his name, to his clients; and if he willingly delay his client's suits, or demand by his bill more than is due, the party may have an action, and recover costs, and treble damages 491
8 And by 2 *Geo.* 2. c. 23. s. 23. no attorney shall commence an action for fees until one month after the delivery of his bill, subscribed with his proper hand; and upon application of the party chargeable by such bill, and submission to pay what shall be found due upon a taxation thereof, the same shall be referred to be taxed; and upon the taxation, the party shall forthwith pay the sum found due thereon, or be liable to an attachment, &c. And if the attorney have been overpaid, he shall refund, or be liable to an attachment, &c. And the respective courts may award the costs of taxation, according to the event thereof, &c. 492
9 Attornies may write their bills with such abbreviations as are commonly used. 12 *G.* 2. c. 13. s. 5. 495
10 The 2 *Geo.* 2. c. 23. not to extend to any bill between one attorney and another. 12 *G.* 2. c. 13. s. 6. ibid.
11 In an action for an attorney's fees, the defendant may plead the 3 *Jac.* 1. c. 7. in bar, or may give that statute in evidence, at the trial 495
12 But the 3 *Jac.* 1. is no plea where an attorney declares upon a special promise to pay what the plaintiff should expend; or upon an *insimul computasset*; or a general *indebitatus assumpsit* 496
13 This statute (No. 12) extends only to suits in the courts of *Westminster-Hall* 496
14 Before an attorney can support an action for fees, he must *leave* a bill thereof with his client 497
15 But the court will not stay proceedings in such an action till the delivery of a bill, nor on the ground that the action was begun within a month after the delivery of a bill; because the defendant may take advantage thereof, either by pleading, or at the trial 498
16 In an action by an administrator, upon an attorney's bill, proof of the delivery of a bill to the defendant is unnecessary ibid.
17 So it is in an action for business done by the plaintiff, as an attorney, at the quarter sessions 499
18 An attorney's bill need not have been delivered a month, to entitle him to *set it off* in an action against him ibid.
19 Unless the party, chargeable with such a bill (No. 18), apply within a reasonable time after delivery, or payment thereof, the court will not, except under special circumstances, refer it for taxation 500
20 It seems unsettled whether an attorney's bill, made out according to a special agreement, is liable to be taxed 502
21 If an attorney's bill have been delivered a month, without any appli-

cation to have it taxed, the reasonableness of the several items contained in it cannot, afterwards, in an action brought upon it, be discussed, or questioned, upon a trial, or the execution of a writ of inquiry - - 502
22 Unless an attorney signs his bill, the court cannot refer it to be taxed - - 505
23 And in the case of an executor or administrator of an attorney, the court of C. B. will not refer a bill due to the testator or intestate, to be taxed - - - ibid.
24 But it is said that B. R. will now refer such a bill (No. 23.) for taxation - - - ibid.
25 If the *whole* of an attorney's bill be for *conveyancing* business, it cannot be taxed - - ibid.
26 But if he deliver two bills, one of which is for fees, and the other for conveyancing, *both* may be taxed - - 506
27 So if he deliver but one bill, and part of it only be for business done in court, and the rest for business of another nature, the *whole* may be referred for taxation - - ibid.
28 And now though the *whole* of an attorney's bill be for business done at the quarter sessions, it may be taxed - 506, 7
29 So may an agent's bill to an *attorney* in the country 507
30 By whom the costs of taxation shall be paid - 509
31 All affidavits produced upon the taxation of costs in C. B. must be filed with the prothonotary - 511
32 After an attorney's bill has been taxed by the proper officer of a court at law, equity will not entertain cognizance of a bill filed by the attorney, suggesting improper deductions on the taxation, and praying an account, &c. - 512
33 Neither can an attorney or solicitor bring a bill in equity for his bill - - - ibid.
34 After the taxation of a solicitor's bill, the client cannot have an antecedent demand deducted out of the sum found due on such taxation - - - 513
35 A party cannot change his attorney without leave of court, which will not be granted until the attorney's bill has been paid ibid.
36 Of an attorney's lien upon deeds, &c. for his bill of costs 514, &c.
37 If a plaintiff compromise the debt and costs with the defendant before the plaintiff's attorney has been paid, the court will not oblige the defendant to pay him, unless he gave notice to defendant not to settle with plaintiff, until his bill should be paid 519
38 Or except, perhaps, where the agreement between the parties appears to be collusive, and without any consideration 520
39 If the executor of an attorney, who employed a clerk in the crown-office, deliver a bill to a client of the testator, including the demand of such clerk in court, the court will order the original client to pay the clerk in court his demand, and the remainder of the bill to the executor - 521
40 And Chancery will make a similar rule in favour of a clerk in court, where there is any money remaining due in the hands of the original client - 522

AUDITA QUERELA.

1 No costs are recoverable in a writ of *audita querela* 603

B

BAIL.

1 The payment of the costs incurred by the assignment of a bail-bond, is always made one of the terms of staying proceedings in an action on such bond - 605
2 Bail *below*, or to the sheriff, are liable to pay the real debt, though it should exceed the sum sworn to and costs, to the full extent of the penalty of the bail-bond - 606
3 But where either the plaintiff or defendant in the original action dies, before judgment could have been obtained therein, the court will stay proceedings on the bail-bond on payment of costs only ibid.
4 And before the court will stay proceedings in an action on a bail-bond, the costs of the actions against the principal and the other bail, must be paid - ibid.
5 Bail *above* are not liable beyond the sum sworn to and costs ibid.
6 Equitable costs cannot be levied out of the penalty of a recognizance of bail - 607
7 Bail in the original action are not liable to the costs of a writ of error in the Exchequer-chamber - ibid.
8 Yet, in one case, after judgment on a *scire facias* against bail, the court made them, on granting a motion to stay execution, undertake to pay the costs of a writ of error brought by their principal, in case of the affirmance of the judgment - ibid.

BANKRUPT.

1 Where a debt arises before, but a verdict is obtained, and the costs taxed after the bankruptcy of the defendant, though previous to the allowance of his certificate, the costs relate to the original debt, and the certificate extends to both - 608, 9
2 And if a creditor obtain a verdict before the issuing of the commission, he is entitled, notwithstanding final judgment should not be signed till after the commission was taken out, to prove both debt and costs - - - 609
3 And there is no distinction as to this point, between *assumpsit*, and *tort*, where a judgment follows the verdict ibid.
4 Though, in one case, it was holden that costs did not become a debt till the judgment - - 610
5 Costs in equity do not become a debt until they are taxed ibid.

BARON AND FEME.

1 By and to whom costs are payable in actions by or against husband and wife - - - 597
2 The *husband* cannot have execution for the costs, on a plea of coverture found for the defendant, without a *scire facias* 598
3 If a feme covert sue another woman in the spiritual court for incontinence with her husband, and obtain a decree with costs, the husband may release the costs - ibid.
4 But not if the husband and wife are divorced *a mensâ et thoro*, and the wife has alimony - - 599

BILL OF EXCHANGE. *Vide* PRACTICE, No. 19.

C

CERTIFICATE. *Vide* OFFICER, No. 9. 21, 22.—CUSTOMS, No. 8. 14, 15.

1 A certificate upon the statute of 43 *Eliz.* c. 6. may be granted *after* the trial of the cause - 30
2 But a certificate upon the 22 *Car.* 2. c. 9. must be granted *at* the trial - - 45

CERTIORARI. *Vide* INDICTMENT, No. 2, 3. 6.

1 Upon removing proceedings on the 16 *Geo.* 3. c. 30. (an act against *deer*-stealers) by *certiorari*, the party convicted shall become bound to the prosecutor in 100*l.* with sufficient sureties, for payment of the prosecutor's costs and damages within 30 days after conviction affirmed - - 559
2 No *certiorari* shall be allowed to remove any conviction or proceedings on the 5 *Ann.* c. 14. or the 4 and 5 *W.* and *M.* c. 23. (acts for the preservation of the game) unless the party convicted become bound to the prosecutor in 50*l.* with sufficient securities, for paying the prosecutor's costs within 14 days after affirmance of conviction 561
3 And by 5 *Geo.* 2. c. 19. s. 2. no *certiorari* shall be allowed to remove any judgment or order of a justice of the peace, until the party prosecuting such *certiorari* hath entered into a recognizance with sufficient sureties, in 50*l.* to prosecute the same with effect, and to pay full costs in case such judgment or order be affirmed 562
4 Which recognizance (No. 3.) shall be certified into the King's Bench, and there filed with the *certiorari* and order or judgment removed; and if the party do not pay costs in case of an affirmance, within ten days after demand, he shall be liable to an attachment 563
5 Within what time a *certiorari* for the removal of convictions, &c. before justices of the peace, or the general or quarter sessions, must be applied for, and what notice given thereof - ibid.
6 In the case of a conviction for deer-stealing, the defendant may either remove the proceedings by *certiorari*, or appeal to the sessions; but if he adopt the latter mode the *certiorari* is barred. (No. 1.) 564
7 Upon the affirmance of a conviction for deer-stealing, the prosecutor is entitled to *taxed* costs only - ibid.
8 Where a *certiorari* is brought to remove a conviction on the 5 *Ann.* c. 14. (No. 2.) from absolute necessity, and not for vexation, nor with a view to controvert the conviction, the defendant shall not pay costs, notwithstanding the conviction be affirmed - 565
9 If any material part of an order of sessions be *quashed*, although the residue be affirmed upon a removal by *certiorari*, no costs are payable under the 5 *G.* 2. c. 19. (No. 3.) - 568
10 So where a sessions case, removed by *certiorari*, is sent down to be restated, and upon it's being returned amended, the parish removing it, *abandon* the prosecution, they are not liable to costs 569
11 But if such parish *dispute* the *amended order*, they shall pay costs, in case the order be affirmed - ibid.
12 It is discretionary in the court whether they will grant a *certiorari* or not; and, in one case, the court said, that, for the future, they would

oblige the party applying for a *certiorari* to enter into a recognizance to pay costs - 570

CHURCHWARDEN. *Vide* OFFICER, No. 2. &c.

COGNIZANCE.

1 Where a claim of cognizance of pleas by a third person, is disallowed, the defendant is not liable to any costs - 596

COMMON INFORMER.

1 A common informer is, in no case, entitled to costs, unless the statute, upon which he sues, expressly gives them 19. 200

2 But where a penal action is compounded by leave of the court, the plaintiff may be allowed a reasonable sum for his costs 200

3 Costs are recoverable in an action upon a statute, brought by the *party grieved*, for a *certain* penalty, though the statute does not mention costs - - 17. 201

4 But where a penalty is limited generally to any one that will sue for it, without mentioning costs, although the party grieved happen to bring the action, no costs are recoverable - 201

5 By 18 *Eliz.* c. 5. if an informer or plaintiff upon a penal statute, willingly delay his suit, discontinue, or be nonsuited, or have a verdict or judgment against him therein, the defendant shall have costs ibid.

6 Where judgment is given against an informer because the statute on which he proceeds, is discontinued, or not in force, he shall pay costs by the 18 *Eliz.* c. 5. - 203

7 So he shall, where judgment is given against him, because the court in which he sues has no jurisdiction - 203

8 So where he enters a *noli prosequi* - 204

9 This statute (No. 5.) extends to all actions by common informers, notwithstanding such actions be grounded on statutes made subsequent thereto - - ibid.

10 A party grieved is not in an action on a penal statute liable to costs under the 18 *Eliz.* c. 5. - 205

11 But he is under the 4 *Jac.* 1. c. 3. on a nonsuit or verdict against him, provided he would, on a recovery, have been entitled to costs ibid.

12 But a *qui tam* informer is liable to costs under the first mentioned statute (No. 5.) as well as an informer suing for the whole penalty, even although part of the penalty should be limited to the king ibid.

13 If it appear upon the record, that the plaintiff is a common informer, the court will not receive an affidavit to the contrary 207

14 Although the defendant remove a *qui tam* information from the sessions into B. R. he shall have costs on a verdict in his favour 208

CONSCIENCE. *Vide* COURT OF CONSCIENCE.

CONSTABLE. *Vide* OFFICER, No. 2, &c.

1 If the overseers of the poor of any place find such place aggrieved by any neglect or act of the constable thereof, or have any material objection to the accounts of such constable, they may appeal to the sessions, who shall hear and determine such appeal, and order to the party prevailing thereon, reasonable costs. 18 *Geo.* 3. c. 19. s. 5. 557

CONVEYANCING. *Vide* ATTORNEY, No. 25, 26.

PRINCIPAL MATTERS.

COSTS. *Vide* BANKRUPT.—DAMAGES, No. 2, 3, 4, 5, 6, 7, 8, 9, 10.—DOUBLE OR TREBLE COSTS, No. 1.—PRACTICE.—SECURITY.—AS TO COSTS UPON A JUDGMENT, OR VERDICT AS TO PART ONLY FOR THE PLAINTIFF, *vide* VERDICT.

1 Before the statute of *Gloucester*, 6 *Edw.* 1. c. 1. a plaintiff was not, in any case, entitled to recover costs of suit - 2

2 And a defendant in one instance only, viz. in a writ of right of ward, in which, in case the issue was found in his favour, he was entitled to costs by virtue of the statute of *Marleberge* - ibid.

But costs, though not recoverable at common law *eo nomine*, were usually considered and included in the *quantum* of damages, in those actions wherein damages were given - 3

4 Now however by the statute of *Gloucester*, a party shall recover *costs* in all cases, where he is to recover *damages* - 4

5 That is where there is a plaintiff or defendant, demandant or tenant, for though damages should be found for the prosecutor upon the traverse of an inquisition, he cannot have costs under this statute. (No. 4.) - - - 20

6 In what cases the king's pardon will discharge the costs in a suit in the spiritual court - 599

7 A gross sum may be assessed by the jury for damages and costs; or damages and costs may be assessed separately - 620

8 In the former case, however, the plaintiff cannot have judgment beyond the amount of the damages laid in his declaration; in the latter he may - - - ibid.

9 What shall be deemed error with regard to costs in the entry of judgment upon the record - 621

10 If the jury assess costs, where none are recoverable by law, the judgment should be entered *nullo habito respectu* to such costs 622, 3

11 The jury ought *ex officio* to give costs in an action in which they are legally recoverable; but if they refuse to do so, the court will, afterwards, on motion, supply the omission - 623

12 The court will grant an attachment against a party for nonpayment of costs taxed under a rule of court, on an affidavit of a demand and refusal - - - ibid.

13 A demand of costs must be made when the rule is served; and the court will grant an attachment for nonpayment in the first instance, and on the last day of a term - 624

COURT OF CONSCIENCE.

1 Debts not amounting to 40*s.* due to and from persons inhabiting in *London*, may be recovered in the court of Requests or Conscience in that city. 3 *Jac.* 1. c. 15. s. 2. - 153

2 And if, in any action of debt or *assumpsit* brought elsewhere than the said court of Requests, (No. 1.) it shall appear to the court, that the debt to be recovered doth not amount to 40*s.* and the defendant in such action, shall duly prove, that, at the commencement thereof, he was resiant in *London*, he shall have costs. 3 *Jac.* 1. c. 15. s. 4. 154

3 No action for rent on any lease, or any real contract, or for any debt arising by reason of any cause concerning a testament, matrimony, or any thing concerning or belonging to the ecclesiastical court, or for use and occupation, lies in the *London* court of Conscience 155. 163

4 A court of Requests constituted for the *Tower-Hamlets*, by 23 *Geo.* 2. c. 30. - - 156
5 By 23 *Geo.* 2. c. 33. a special county court shall be holden once a month in every hundred of the county of *Middlesex* 156
6 And in case debt or *assumpsit* be brought in any of the courts at *Westminster*, and the defendant at the time of bringing thereof *reside* in *Middlesex*, and *be liable to be summoned to the said county court* (No. 5.) and the jury find damages for the plaintiff, under 40*s.* unless the judge certify in open court, that the freehold or title to the plaintiff's land was in question, defendant shall recover *double* costs of suit 157
7 A defendant may either plead the 3 *Jac.* 1. c. 15. in bar, or have the benefit of it after a *verdict* against him, by a suggestion upon the roll ibid.
8 And, in the latter case, he shall have the costs of the motion for the suggestion - - 158
9 But after a judgment by *default*, he cannot enter a suggestion on the roll - - ibid.
10 Form of such suggestion. (No. 7.) 158, n. (1)
11 Though a plaintiff *declare* for more, if he recover a verdict for *less* than 40*s.* defendant is entitled to enter a suggestion for costs 158
12 But if the original demand be above 40*s.* though reduced below that sum at the trial, by a *set off*, defendant is not entitled to costs, notwithstanding he may be a person within the jurisdiction of a court of conscience - - 159
13 Nor if there is a *plea* of *tender* as to part and *non assumpsit* as to the residue, and, the issue on the tender being found for defendant, the balance proved is under 40*s.* - 160
14 But it is otherwise where the plaintiff's demand is reduced by *payment* in part, prior to the action, to less than 40*s.* 161
15 In a proper case, the court are bound to allow a defendant to enter a suggestion (No. 7.) upon the record - ibid.
16 If upon a cause being referred, at the trial, to arbitration, under 40*s.* be awarded as due to the plaintiff at the commencement of the suit, defendant, being a person within the jurisdiction of a court of conscience, shall have costs - - 162
17 Neither *personal representatives* nor *attornies*, though resident in *Middlesex*, are liable to be sued in the county court there, therefore, when sued in a superior court, cannot have double costs, though the damages are under 40*s.* - 165
18 Neither can a defendant have the benefit of the 23 *Geo.* 2. c. 33. though resident within the jurisdiction of the county court of *Middlesex*, where the plaintiff is an *attorney* - 167
19 But such a defendant is so entitled (No. 18) whether the plaintiff sue in his own right, or as *personal representative* - ibid.
20 By 23 *Geo.* 2. c. 27. a court of requests is established for the city and liberty of *Westminster* and that part of the Duchy of *Lancaster* adjoining thereto - - 168
21 *Attornies* may be sued in this court. (No. 20) 166
22 This statute (No. 20) must be *pleaded in bar*, or at least ought to be taken advantage of at the trial 169

PRINCIPAL MATTERS.

CUSTOMS.

1 Every person, upon entering a claim to prohibited and uncustomed goods, seized by an officer of the customs, shall give security in the penalty of 30*l.* to answer the costs occasioned by such claim. 8 *Anne*, c. 7. s. 63. - - 243

2 And the claimant of any vessel or boat seized as forfeited, shall give the like security (No. 1). 15 *Geo.* 2. c. 31. s. 7. ibid.

3 By 6 *Geo.* 1. c. 21. s. 39. any officer of the customs, finding prohibited or customable goods in a boat, &c. without the presence of an officer, or, upon credible information, in a house, &c. upon due search there made, may stop and put the same in his majesty's warehouse, till claimer thereof prove on oath the duties to have been paid, or the goods to have been bought in a lawful way of trade 244

4 Which proof (No. 3) is to be made within ten days after the goods shall have been stopped - 245

5 And such proof to lie on the claimer of the goods, and if thereupon a verdict pass for such claimer, or judgment be otherwise given against the officer, he shall, besides his goods, or the value thereof, have reasonable costs, which shall be deemed a full satisfaction for his damages occasioned by the seizure. 6 *Geo.* 1. c. 21. s. 41. ibid.

6 Notwithstanding the directions of the officers of the customs for the delivery of goods stopped, any officer of the customs may seize and prosecute the same, and, in such case, the owner of the goods may sue such officer for the same, or the value thereof, with full costs of suit; or if the commissioners do not order the goods to be delivered, the owner may sue for the recovery thereof, with costs and damages. 6 *Geo.* 1. c. 2. s. 43. - - 246

7 If, upon hearing of an appeal in a cause of excise, the original judgment be reversed, the party originally prosecuting shall pay double costs; but if the first judgment be affirmed, the party appealing shall pay double costs. 15 *Car.* 2. c. 11. s. 19. 247

8 Where, in a suit on account of the seizure of any ship or goods seized as forfeited, by any act of parliament relative to his majesty's customs or excise, or other his majesty's revenues, the claimer obtains a verdict, and the judge certifies on the record that there was a probable cause for the seizure, the claimant shall not be entitled to any costs. And in case any action, indictment, or prosecution be brought against any person on account of such seizure, and the judge certify a probable cause for it, the plaintiff, exclusive of the thing seized, or the value thereof, shall not be entitled to above 2*d.* damages, nor to any costs of suit, nor shall the defendant in such prosecution be fined above 1*s.* 19 *Geo.* 2. c. 34. s. 16. 23 *Geo.* 3. c. 70. s. 29, 24 *Geo.* 3. c. 47. s. 35. 26 *Geo.* 3. c. 40. s. 31. 28 *Geo.* 3. c. 37. s. 24. 248, &c.

9 Actions against officers of the excise or customs to be brought within three months after cause of action accrued, and to be laid and tried in the county where the facts were committed, to which defendant may plead general issue, and give special matter in evidence; and if he obtain judgment, have treble costs. 23 *Geo.* 3. c. 70. s. 34. 28 *Geo.* 3. c. 37. s. 23. - - 251

10 Any such officer (No. 9) within one calendar month after receiving notice of an intended action, may tender amends, and, if same are not

accepted, plead such tender in bar; and if the jury find the amends tendered sufficient, they shall find for the defendant, who, in such case, or in case judgment shall otherwise pass for him, shall have the like costs as if he had pleaded the general issue only; but if the jury find that no amends were tendered, or that they were insufficient, plaintiff shall have a verdict with damages and costs. 23 *Geo.* 3. c. 70. s. 31. 28 *Geo.* 3. c. 37. s. 26. - 252

11 And if any such officer (No. 9) neglect to tender, or tender insufficient amends, before action brought, he may, by leave of court, before issue joined, pay money into court, upon which such orders, &c. shall be made as in other actions. 23 *Geo.* 3. c. 70. s. 33. 28 *Geo.* 3. c. 37. s. 28. - - 254

12 The person *in whose name* an information is exhibited in a cause of excise, is the *original* prosecutor within the 15 *Car.* 2. c. 11. (No. 7) 254

13 The Attorney-General, as well as the officer, is entitled to costs under the 8 *Anne*, c. 7. (No. 1) upon a judgment for the king 255

14 A certificate upon the 19 *Geo.* 2. c. 34. (No. 8) may be granted *after* the trial, and a court of *appeal* is competent to grant it 257

15 But this certificate (No. 8) does not extend to injuries accompanying the seizure of the goods; so as to prevent the plaintiff from recovering damages and costs as to such injuries - 257

16 If an excise officer, having omitted to tender amends before action brought (No. 11) pay money into court, and the jury find a verdict for him, on the ground that the money paid into court was sufficient for the plaintiff's damages, or there be judgment against the plaintiff, as in case of a nonsuit, yet defendant shall have *single* costs only 259, &c.

D.

DAMAGES. *Vide* CERTIFICATE, No. 1, 2.—DOUBLE OR TREBLE COSTS, No. 1, 2, 3.

1 By the statute of *Gloucester*, 6 *Edw.* 1. c. 2. a party shall recover costs, in all cases, where he is to recover damages 4

2 Where a statute posterior to that of *Gloucester* increases the damages in a case where some damages were recoverable at common law, the plaintiff, in an action upon such statute, shall recover costs, as well as the increased damages, though the act does not mention costs 6

3 But it hath been holden in several cases, that if a statute, subsequent to that of *Gloucester*, give damages in a case where *none* were before recoverable, no costs can be recovered in an action on such statute, unless thereby expressly given - ibid.

4 This distinction was recognized by three judges, in a modern decision of the Court of Common Pleas, but denied by Lord Justice Willes 9

5 And seems to have been over-ruled by a late case in the Court of King's Bench - 15

6 By the 43 *Eliz.* c. 6. s. 2. if, in *any action personal, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands*, nor *for any battery*, the judge, who tries the cause, certify that the debt or damage to be recovered does not amount to 40 *s.* the plaintiff shall have no more costs than damages, but less, at the discretion of the court - - 22

7 Instances of cases, in which there may be a certificate upon this statute, (No. 6) - - 24, &c.
8 By the 22 and 23 *Car.* 2. c. 9. in all actions of *trespass, assault and battery*, and *other personal actions*, in which the judge, at the trial, shall not certify, on the record, that an *assault and battery* was proved, or that the *freehold or title to the land mentioned in the declaration* was in question, the plaintiff, in case the damages be found under 40*s.* shall have no more costs than damages - 40
9 Construction of this statute (No. 8) - 41, &c.
10 On writs of inquiry in cases within the 22 and 23 *Car.* 2. c. 9. a plaintiff shall have full costs, however small the damages may be 45
11 So he shall where a cause originally begun in an inferior court, is removed by the *defendant* - ibid.
12 But not, if the removal were by the *plaintiff* - ibid.
13 Although the jury in a case within this statute (No. 8) find damages under 40*s.* they may assess costs to any amount - ibid.

DARREIN PRESENTMENT.

1. No costs can be recovered in a writ of *darrein presentment* 7

DECIES TANTUM.

1 No costs in a *decies tantum* - 7

DECLARATION. *Vide* PLEADING, No. 15, 16.

1 If indecent or scandalous expressions are unnecessarily introduced into a declaration, the court will inflict exemplary costs on the offending party - - 614

DEDUCTING COSTS. *Vide* DEFENDANT, No. 19, 20.

1 Where costs, due to one defendant, may be deducted from those payable by another defendant, in the same action - 146
2 In what cases the costs of one action shall be deducted from those of another - 467, &c.

DEER-STEALING. *Vide* CERTIORARI, No. 1, 6, 7.

DEFENDANT. *Vide* ABATEMENT, No. 1, 2, 3.—DEMURRER, No. 2, 3, 4, 5, 6, 7.—DISCONTINUANCE, No. 1, 2, 3, 4, 5, 6, 7.—RECORDARI FACIAS LOQUELAM.—SET-OFF, No. 1.—VERDICT.

1 By 23 *H.* 8. c. 15. a defendant shall have costs in certain actions, where plaintiff is nonsuited, or has a verdict against him 124
2 And by 4 *Jac.* 1. c. 3. a defendant, upon a nonsuit or verdict against the plaintiff, shall have costs in every action, where the plaintiff would have had them, in case judgment had been given for him 125
3 Defendant is entitled to costs where judgment is given for him upon a *special*, as well as upon a general verdict - 126
4 And he shall have costs upon a nonsuit, or verdict against the plaintiff, although the declaration be insufficient - 126, &c.
5 But in one case, where it appeared upon the declaration that the defendant might have demurred, the court arrested the judgment 127
6 Defendant is entitled to costs upon a nonsuit, though he may have pleaded an insufficient plea in bar - 129
7 *Query*—Whether there shall be costs upon a nonsuit occasioned by a variance between the *nisi prius* roll and plea roll, where a *distringas de novo* is awarded - - 130
8 A defendant ought to be allowed all such costs on a nonsuit as have been *necessarily* incurred about his defence in the action 134

9 Upon a nonsuit in an action against several defendants, plaintiff may pay the costs to any one of them - 135
10 And though divers defendants appear severally, they shall have the costs of one nonsuit only - ibid.
11 Debt lies in B. R. for the costs of a nonsuit in an inferior court notwithstanding they may not amount to 40*s*. - ibid.
12 If one defendant give plaintiff a general release, after the costs of a nonsuit have been taxed, the court will compel him to pay to the other defendants their shares - 136
13 By the 8 *Eliz.* c. 2. a defendant shall have costs, where the plaintiff delays his suit, discontinues, or is nonsuited - ibid.
14 And by 13 *Car.* 2. st. 2. c. 2. if a plaintiff do not declare before the end of the next term after appearance, a nonsuit may be entered, and the defendant shall have costs - 137
15 If in an action against several defendants, the plaintiff do not declare in due time, there ought to be but one judgment of *nonpros* signed 138
16 Where there are several defendants in an action of trespass, assault, false imprisonment, or *ejectione firmæ*, and any one or more of them acquitted by verdict, he or they so acquitted shall have costs, unless the judge certify, upon the record, that there was a reasonable cause for making him or them defendant or defendants. 8 and 9 *W.* 3. c. 11. 142
17 An action of trespass *on the case* is not within this statute (No. 16) 143
18 Neither is *replevin* nor *trover* - 144, 5
19 Where in trespass *vi et armis* a verdict was found for the plaintiff against one defendant, and against him as to the other defendants, a motion was refused for deducting the costs, to which the acquitted defendants were entitled out of those to be taxed for the plaintiff against the other defendant - - 146
20 But, in another case, where some of the defendants suffered judgment against them by default, and the others went to trial and obtained a verdict, the court allowed the costs and damages on the judgment by default, to be deducted from the costs taxed for the defendants who had a verdict - - ibid.

DEMURRER. *Vide* PLEADING, No. 1, 2, 3, 4, 5, 6, 7.—VERDICT, No. 5, 7.

1 A plaintiff shall have costs, if he obtain judgment on a demurrer, where he would have been entitled to them upon a verdict 19
2 Two pleas, not guilty, and not guilty within six years; upon the first issue was joined, and to the other there was a demurrer, which, on argument after the trial of the general issue (which was found for the plaintiff) was adjudged for the defendant;—neither had the costs of the trial, but defendant had those of the demurrer 119. 151
3 By the 8 and 9 *W.* 3. c. 11. s. 2. if judgment be given against a plaintiff or demandant upon any demurrer, the defendant or tenant shall have costs - - 148
4 The demurrer meant by this statute is a demurrer to the *merits*, upon which the court may decide the right of action, and give final judgment 149

5 Therefore a defendant is not entitled to costs upon a judgment in his favour on a demurrer to a plea in abatement - - 149
6 Neither is he in a species of action wherein the plaintiff would not have had costs in case he had obtained judgment - 150
7 So defendant cannot have costs though a demurrer to a plea be adjudged for him, unless the plea be an answer to the *whole* declaration - - 152

DISCONTINUANCE. *Vide* DEFENDANT, No. 13.—EXECUTOR, No. 11.—OFFICER, No. 23.

1 Plaintiff may discontinue either before or after declaration, on payment of costs - - 139
2 And wherever he discontinues, by leave of the court, defendant is entitled to costs - - ibid.
3 But none are payable on a discontinuance in law - ibid.
4 If plaintiff would have had *double* costs in case he had recovered, defendant shall have double costs on a discontinuance - ibid.
5 There may be a discontinuance after a *special*, but not after a general verdict - - ibid.
6 What costs shall be paid where there is a discontinuance after the regular countermand of a notice of trial - 140
7 The entry of a *noli prosequi* by the plaintiff is a discontinuance within the 8 *Eliz. c.* 2. - 141

DISTRESS.

1 No costs are recoverable in an action on the 1 and 2 *P.* and *M.* c. 12. to recover treble damages for driving a distress out of the hundred in which it was taken - 6. 476

DISTRINGAS.

1 By the 10 *Geo.* 3. c. 50. s. 3. the court out of which a *distringas* proceeds, may order the issues levied from time to time to be sold, and the money to be applied to pay such costs to the plaintiff as the court shall think just - 602
2 The court will not discharge a rule for selling the issues levied upon a writ of *distringas*, though defendant appeared before any issues were actually levied, except on payment of the costs of issuing the *distringas*. ibid.
3. The 10 *Geo.* 3. c. 50. relates to all writs of *distringas* ibid.

DOUBLE OR TREBLE COSTS. *Vide* CUSTOMS.—GAME.—OFFICER.—REPLEVIN, No. 10. 15.

1 If a statute double or treble the damages in a case where single damages were recoverable at the common law, the costs also shall be doubled or trebled, though no costs should be given by such statute 19. 475
2 But if a statute give double or treble damages in a case where none were recoverable at common law, without mentioning costs, no costs shall be recovered in an action on such statute - 476
3 Where a statute gives *treble damages and costs of suit*, the costs as well as the damages shall be trebled - 477
4 Where treble costs are to be recovered against a prosecutor for matter

not appearing on the *postea*, the court will allow a suggestion of the special matter to be made on the record - 479
5 If defendant in a case wherein he is entitled to treble costs, procure single costs only to be taxed, and actually receive, and give a receipt for the same, he is thereby concluded - 480
6 Where double or treble costs are recoverable, both those assessed by the jury, and those adjudged *de incremento* by the court, shall be doubled or trebled - - 481

E

EJECTMENT. *Vide* ATTORNEY, No. 6.—ERROR, No. 12.—TRIAL, No. 5.—PRACTICE, No. 2, 3 4, 5, 6, 7, 8, 9, 10, 11, 12. 23, 24.—SECURITY, No. 1, 2, 3, 4, 5, 6, 7.

ERROR. *Vide* AMENDMENT, No. 6, 7, 8.

1 Writ of error, what - 277
2 Of the parties thereto - - 278
3 From and into what courts, error lies - ibid.
4 No costs in a writ of error, at common law - 279
5 By 3 *H.* 7. c. 10. if any defendant or tenant, against whom judgment is given, sue before, and in delay of, execution, any writ of error, and the judgment be affirmed, the writ of error discontinued, or the party suing it nonprossed, the defendant in error shall have costs ibid.
6 And by 13 *Car.* 2. stat. 2. c. 2. s. 10. if a writ of error be sued out for reversing a judgment given after verdict, and the said judgment be affirmed, the defendant in error shall have double costs for delay of execution - - 280
7 This statute (No. 6) does not extend to actions popular, indictments, &c. - - ibid.
8 By 4 *Anne*, c. 16. s. 25. upon quashing a writ of error, the defendant therein shall have costs, as he should have had if the judgment had been affirmed - - ibid.
9 By 8 and 9 *W.* 3. c. 11. s. 2. if, after judgment for the defendant the plaintiff sue a writ of error, and the judgment be afterwards affirmed, the writ of error discontinued, or nonprossed, defendant in error shall have costs - - 281
10 The 3 *H.* 7. (No. 5) extends to a writ of error created by a subsequent statute - - ibid.
11 If error be brought *after execution*, though the judgment be affirmed, the defendant is not entitled to costs - ibid.
12 So there shall be no costs upon affirmance of a judgment in ejectment, where execution was executed as to the *damages and costs*, though not as to the term, before error brought - ibid.
13 And if execution be executed in part only, costs shall be proportionably diminished - 282
14 Costs are recoverable in every writ of error where the judgment is affirmed, although *none were recoverable in the original action* ibid. &c.
15 An executor, bringing error upon a judgment against his testator, the defendant below, is not liable, upon an affirmance of such judgment, to costs - - 286

16 Neither is he so liable in a writ of error, upon a judgment against himself, in an action in which he sued as executor ibid.
17 But if judgment be given below against an executor, *de bonis propriis*, and affirmed in error, *he shall pay costs* 287
18 And, in a recent case, in the Exchequer-chamber, it was holden, that executors and administrators are liable to costs in a writ of error, where they would be so in the original action ibid.
19 Where the plaintiff in error is *barred*, it is said, defendant in error shall have no costs - - 288
20 Whether there shall be costs, where the defendant in error pleads a release of errors, which is found for him, or confessed ibid.
21 It seems there shall be costs in error although the affirmance of the judgment be not upon the merits, but by consent of the plaintiff in error - - 289.
22 A defendant in error is entitled to costs where the writ of error is quashed, though no costs were recovered in the original action 290
23 If one of two defendants bring error, and the writ be quashed on motion, the defendant in error shall not only have the costs of such motion, but costs as if the judgment had been affirmed 292
24 It is clear that a plaintiff in error shall pay costs where the writ is quashed through his own laches; but if the cause of quashing it proceed from the voluntary act of the defendant in error, the plaintiff is not liable to costs; on the contrary, the court will, perhaps, in such case, oblige the defendant in error to pay costs - ibid.
25 But the court will not compel a defendant in error to pay costs, though the writ should be quashed through his act, where such act is not reprehensible - 293
26 If the judgment in the original action be reversed in error, no costs are payable on account of the writ of error - 294
27 The mode of allowing and taxing costs upon writs of error 294,5

EXCISE. *Vide* CUSTOMS, No. 7, &c.

EXECUTOR. *Vide* ATTORNEY, No. 16, 23, 24, 38, 39.—COURT OF CONSCIENCE, No. 17, 19.—ERROR, No. 15, 16, 17, 18.—NONSUIT, No. 15.—PRACTICE, No. 16.—PROHIBITION, No. 25.—REPLEVIN, No. 13.

1 An executor, or administrator, when plaintiff, is not liable to costs upon a nonsuit, or verdict against him - 173
2 Nor, it should seem, upon a judgment against him upon demurrer 174
3 But this exemption from costs extends only to cases where the plaintiff cannot maintain the action unless in his representative capacity; for if an executor or administrator can bring the action in his own right, without naming himself executor or administrator, he shall, on a nonsuit, or verdict against him, pay costs 174, &c,
4 If an executor be nonsuited, or a verdict pass against him, in trover, for a conversion of the goods of the testator in his lifetime, plaintiff is not liable to costs - 183
5 But he is, on a nonsuit or verdict against him, in trover upon a conversion *after* the testator's death - 184
6 And if he declare upon a trover and conversion in the testator's lifetime, and a trover and conversion after his death, in distinct counts,

he shall not pay costs, if the evidence adduced at the trial were applicable to the first count only - 184
7 An executor is not liable to costs, though he proceed to trial after the payment of money into court, and recover a verdict for a less sum 187
8 A plaintiff executor is not liable to costs under the 5 *Geo.* 2. c. 30. s. 7. though defendant plead the general plea of bankruptcy, and obtain a verdict - - 188
9 Nor upon a *judgment* against him, *as in the case of a nonsuit* 189
10 If an executor's not going on to trial, pursuant to notice, proceed from his own *laches*, he shall pay costs, but not otherwise 189, 190
11 Whether an executor shall pay costs upon discontinuing his action 191. 193, &c.
12 He shall pay costs upon a judgment of *nonpros* 195
13 An executor defendant is liable to costs like any other defendant 196
14 If a bankrupt executor plead a false plea, in an action commenced against him by a creditor of his testator, between the issuing of the commission and obtaining his certificate, he may be taken in execution for the costs - 196
15 Where an executor pleaded the general issue, and a specialty debt, sufficient to cover the assests, the court allowed him to withdraw the former plea, on payment of the costs occasioned by that plea only 197

F

FEIGNED ISSUE.

1 When used - - - 333
2 Where a feigned issue is directed by a court of law, costs always abide the event of the verdict, though not mentioned in the rule, and this, though such feigned issue should be ordered in proceedings on the *crown* side of the Court of King's Bench - ibid, &c.
3 But when an issue is directed by a court of equity, costs are in the discretion of the court - - ibid.
4 And, in a late case, the Court of King's Bench strongly intimated an opinion, that it would be prudent in future, on permitting a feigned issue to be tried, to make the parties consent that the costs should be in the discretion of the court - 336, n. (1)
5 From what period the costs taxed upon a feigned issue shall be allowed - - 336, &c.
6 If the plaintiff submit to a *nonpros* in a feigned issue, defended on behalf of the crown, he shall not pay costs - 342
7 If any one of several feigned issues be found for the plaintiff, he shall have costs - - 343
8 Where in an issue directed out of Chancery, the plaintiff does not proceed pursuant to his notice of trial, that court will, on motion, give costs - - ibid.

FORCIBLE ENTRY.

1 In an action upon the 8 *H.* 6. c. 9. s. 6. for a forcible entry, the plaintiff shall recover treble costs, as well as treble damages 475

3 When there shall be costs and damages upon an indictment for a forcible entry - - 525. 528

FOREIGN ATTACHMENT.

1 Plaintiff in a foreign attachment shall not recover costs against the garnishee - - 603

FOREIGNER. *Vide* SECURITY, No. 2, 8, 9, 10, 11.

FORMA PAUPERIS.

1 Every poor person, having cause of action, shall have original writs, counsel, and attorney, without fee or reward. 11 *H.* 7. c. 12. 210
2 A plaintiff, suing in *formâ pauperis*, shall not pay costs, but suffer such other punishment as by the discretion of the court shall be thought reasonable. 23 *H.* 8. c. 15. 211
3 When a person may be admitted to sue in *formâ pauperis*, and of the effect of such admission - 212. 217
4 In what cases the court will dispauper a plaintiff admitted to sue in *formâ pauperis*, and where stay proceedings in a second action, until payment of the costs of a former for the same cause 213, &c.
5 The consenting to a trial at bar, on condition of paying only *nisi prius* costs, does not preclude a plaintiff from being admitted to sue in *formâ pauperis* at any subsequent stage of the suit - 215
6 It seems that a plaintiff suing in *formâ pauperis*, is not liable to costs for not proceeding to trial pursuant to notice; but, in such case, a motion may be made to dispauper him - 216
7 Whether such a plaintiff is liable to costs on a judgment as in case of a nonsuit - - 218
8 The court permitted an information for forging a warrant of attorney, to be amended *without* costs, the prosecutor having been admitted a pauper - - 219
9 A pauper may recover costs, though he pays none 220
10 A defendant in a *civil* action cannot be admitted to defend in *formâ pauperis* - 221
11 But a person may be admitted to defend an indictment in that form 220, n. (1)

FORMEDON.

1 In one case, the plaintiff had leave to discontinue an action of formedon on payment of costs - 140

G

GAME. *Vide* CERTIORARI, No. 2. 8.

1 A person, sued on the 25 *Geo.* 3. c. 50. s. 28. for shooting without a certificate, is not entitled to treble costs, on obtaining a verdict 478, 9

H

HABEAS CORPUS.

1 If, in an action of debt, upon the 31 *Car.* 2. (the *hab. corp.* act) against a gaoler for refusing a copy of a warrant of commitment, the plaintiff, the party grieved, obtain a verdict, he shall have costs 17

HIGHWAY. *Vide* INDICTMENT, No. 1.—SESSIONS, No. 3.

HOMINE REPLEGIANDO.

1 Defendant shall have costs, where the plaintiff is nonsuited in a *homine replegiando* - - - 130

HUE AND CRY.

1 A party robbed, recovering damages against the hundred upon the statute of hue and cry, is entitled to costs 10. 12. 15

HUNDRED. *Vide* HUE AND CRY.

1 If a plaintiff obtain a verdict, with damages, in an action against the hundred, upon the riot act (1 *Geo.* 1. stat. 2. c. 5.) he is entitled to costs - - - 9
2 So a party grieved, if he prevail in an action on the 9 *Geo.* 1. c. 22. against the hundred, shall have costs 14, 15
3 Though they, together with the damages recovered, may exceed the sum of 200*l.* - - 15
4 And if the plaintiff be nonsuited in such action (No. 2), defendants are entitled to costs - - 13. 130
5 And, in such case (No. 4), the hundred have a capacity to sue for the costs of the nonsuit - 601

HUNTING. *Vide* INFERIOR TRADESMEN.

1 Hunting *in alieno solo* is actionable at common law 91
2 But a man may justify a trespass in following a fox with hounds over the grounds of another, if he do no more than is necessary for killing the fox - - 91, *marg.*

I

INDICTMENT. *Vide* SESSIONS, No. 4.

1 The court before whom any indictment or presentment shall be tried for not repairing highways, may award costs to the prosecutor if the defence be frivolous; or to the defendant, if the prosecution be vexatious. 13 *Geo.* 3. c. 78. s. 64. - 525
2 By the 5 and 6 *W.* and *M.* c. 11. all the parties indicted, prosecuting a *certiorari* for removing any indictment or presentment of trespass or misdemeanor, before trial, from the sessions, shall find two sufficient manucaptors to enter into a recognizance, in 20*l.* to appear and plead in B. R. to the indictment, &c. and, at his own costs, to try the same at the next assizes, or term, on due notice to the prosecutor. And such recognizance, *certiorari* and indictment shall be filed in B. R. and the name of the prosecutor (if he be the party grieved, or some public officer) endorsed on the indictment - 526
3 If the defendant, prosecuting such *certiorari*, be convicted, the court shall give reasonable costs to the prosecutor, if he be the party grieved, or a civil officer, prosecuting as such; and in case of refusal of payment of such costs within ten days after demand, the defendant is liable to an attachment. 5 and 6 *W.* and *M.* c. 11. s. 3. 527
4 Neither a recognizance in a sum exceeding 20*l.* nor a recognizance to

remove an indictment from a court of *oyer* and *terminer* is within this statute (No. 2.) - - - 529
5 Upon what terms the court will discharge such recognizances (No. 4.) - - - ibid. &c.
6 The prosecutor of an indictment, removed into B. R. by *certiorari* from the sessions, is not entitled to costs under the 4 and 5 *W.* and *M.* c. 11. unless he be either the party really injured, or a civil officer 533
7 And to entitle a civil officer, under this statute, to costs, he must prosecute *ex officio* - - - 534
8 But the not endorsing the prosecutor's name upon the indictment, it should seem, does not affect his title to costs 536
9 The prosecutor is not entitled to the costs of a trial at bar, the statute (No. 2.) only extending to small offences - ibid.
10 Nor to any other costs, than such as were incurred *subsequent* to the *certiorari* - - - 538
11 Where the defendant in an indictment has been convicted and *fined*, and the third part of the fine paid to the prosecutor, he cannot also have costs under the recognizance, but so much shall be deducted as he has received for the one-third of the fine - ibid.
12 Until ten days have fully elapsed after a demand of costs taxed upon a recognizance under this act, (No. 2.) an attachment cannot be granted against the party refusing to pay them 539
13 And a person in custody, upon an attachment for nonpayment of these costs, may be discharged under the Lords' act 540
14 The personal representatives of the prosecutor of an indictment are, under the 5 and 6 *W.* and *M.* entitled to the costs *taxed during his life*, although no personal demand was ever made by the prosecutor 544
15 But, in such case, (No. 14.) the court will not grant an attachment against the defendant for nonpayment, but make a rule for estreating his recognizance - - ibid.
16 Whether costs are payable, where an indictment is not tried pursuant to notice - - - 546, 7
17 An indictment being considered as the suit of the king, who neither pays nor receives costs, no costs are payable to or by either prosecutor or defendant, unless under some statute 548
18 But the King's Bench, by virtue of a privy seal, may give to a prosecutor the third part of a fine assessed on a criminal prosecution, by way of reimbursing him his costs - 538
19 And to induce defendants to pay prosecutors their costs, it is the practice of that court, as well as of the sessions, to intimate an inclination to mitigate the fine to the king - 549
20 But, at this day, it should seem, that the King's Bench will not, in any case of a conviction upon an indictment, impose a larger fine than is proportionate to the offence, although the defendant should refuse to make any compensation to the prosecutor for his costs ibid. &c.
21 Prosecutor not allowed to quash his own indictment, but upon payment of defendant's costs - 548

INFANT.

1 An infant must sue either by *prochein amy*, or guardian, and appear and defend by guardian - 222
2 An infant plaintiff is not *personally* liable to costs ibid

3 But his *prochein amy* or guardian is - 223
4 And for nonpayment of such costs on demand, the court will grant an attachment against the *prochein amy* or guardian 224
5 But where the bill of an infant was dismissed for want of prosecution, and the infant died before the costs were taxed, it was holden that the *prochein amy* was not liable - ibid.
6 And, in one case, where an infant plaintiff was taken in execution for costs, the court refused to discharge him on motion ibid.
7 When an infant sues, the court will oblige the *prochein amy*, or guardian, or attorney, to give security for the costs 225
8 An infant *defendant* is liable to costs - 226

INFERIOR TRADESMEN.

1 By 4 and 5 *W.* and *M.* c. 23. s. 10. inferior tradesmen, &c. are made liable to damages and full costs in actions of trespass for hunting, &c. upon another person's land - 90
2 It was adjudged, in one case, that this statute extends to all inferior tradesmen, however qualified, with respect to estate 91
3 But neither that point, nor what species of tradesmen shall be said to be inferior, and what superior, seems to be settled 93
4 If, in an action laid upon the 4 and 5 *W.* and *M.* c. 23. the plaintiff do not prove the circumstances under that act, but only the trespass, he may recover as in a common action of trespass - 99
5 An inferior tradesman's hunting in company with a person qualified, does not exempt him from the payment of full costs 101
6 The declaration in an action of the 4 and 5 *W.* and *M.* c. 23. need not conclude with *contra formam statuti* - 91. 93
7 But such conclusion will not hurt, but may be rejected as surplusage ibid.
8 To entitle himself to the benefit of this act the plaintiff must prove defendant that particular sort of tradesman named in the declaration, though alleged under a *videlicet* - 101, 2

INFORMATION. *Vide* QUO WARRANTO.

1 By the 4 and 5 *W.* and *M.* c. 18. the clerk of the crown in the King's Bench shall not, but by order of court, exhibit an information for any misdemeanor before the person procuring such information to be exhibited has entered into a recognizance to the person to be informed against in 20 *l.* to prosecute with effect, and abide by the orders of the court - - 571
2 Which recognizance the said clerk of the crown, or any justice, where the cause of any such information shall arise, may take; and the same shall be filed in the Crown-office for public inspection 571
3 And in case the person informed against appear, and plead to issue, and the prosecutor do not, at his own costs, proceed to trial within a year after issue joined; or if upon trial, a verdict pass for the defendant; or the informer enter a *noli prosequi*; the defendant shall have costs, unless the judge, at the trial, certify that there was a reasonable cause for such information - 571
4 If the informer do not within three months after taxation and demand, pay the costs, the defendant shall have the benefit of his recognizance to compel him - - ibid.

5 This statute extends only to informations exhibited by the master of the Crown-office - - 572
6 Where an information is tried at bar, the defendant can have no costs within this act, that not being a case within it - 573
7 So if there be several defendants in an information for a misdemeanor, and any one of them be found guilty, those who are acquitted are not entitled to costs - - 146. 573
8 But where the defendant in an information is acquitted, and the judge does not certify a reasonable cause for exhibiting the information, the King's Bench is bound to give costs, whether the acquittal were upon the merits, or from any other cause - 574
9 In such case, (No. 8.) however, the defendant is not entitled to costs, beyond the extent of the recognizance entered into by the prosecutor, which is only 20*l.* - - 574, 5
10 The prosecutor shall pay costs for not proceeding to trial pursuant to notice, though issue may not have been joined a twelvemonth 576
11 If the defendant in an information die before the *taxation* of such costs (No. 10.) his executor is not entitled to them 577, 8
12 And where an information was filed in the Attorney-General's name for beating a custom-house officer, it was holden, that the prosecutor was not liable to costs for not going to trial according to notice 578
13 On a rule for an information, though the court may think a ground is laid, yet if, under the circumstances, the payment of the prosecutor's costs appears an adequate punishment, they will discharge the rule, on the defendant's undertaking to do so ibid.
14 If it appear, on shewing cause against a rule for an information against a justice of peace for a misdemeanor in his office, that he acted not only rightly, but upon right motives, the court will discharge the rule *with costs* - 579
15 But *without* costs, if it appear that the justice acted *irregularly*, though without any injurious intention - ibid.

INFORMER. *Vide* COMMON INFORMER.

INGROSSERS.

1 No costs are recoverable in an action upon the 5 *Edw.* 6. c. 14. against ingrossers - - 8

INQUIRY.

1 Where the plaintiff does not execute a writ of inquiry, pursuant to notice, nor countermand the same in due time, defendant shall have costs - - - 412

JOURNEIS ACCOUNTS.

1 If a writ abate by the act of God, and the plaintiff purchase a new one by *journeis accounts*, he shall have the costs of the first writ 5
2 But not, if the first writ abate through his own default ibid.

JUDGMENT. *Vide* NONSUIT, No. 2, &c.—VERDICT.

1 Where, in an action of slander, a judgment for damages and costs shall be reversed *in toto* - 40
2 Where judgment is arrested, each party pays his own costs 129

JURY. *Vide* SPECIAL JURY.

K

KING. *Vide* COMMON INFORMER, No. 12.—NEW TRIAL, No. 7.

1 The king, generally speaking, neither pays nor receives costs 21. 125
2 The 33 *H.* 8. c. 39. s. 54. however, enacts that the king in all suits upon specialties to himself, or to any other for his use, shall recover costs - - 21

L

LIEN.

1 Of an attorney's lien upon deeds, &c. for his bill of costs 514, &c.

M

MALICIOUS TRESPASS. *Vide* WILFUL AND MALICIOUS TRESPASS.

MANDAMUS. *Vide* NONSUIT, No. 6.

1 Writ of *mandamus*, what - 325
2 On what occasions grantable - - ibid.
3 How granted, and of the return thereto - 326
4 Action on the case lies for a false return to a *mandamus*, in which costs may be recovered by either plaintiff or defendant 327
5 By 9 *Anne*, c. 20. where a return is made to a *mandamus*, issued in any of the cases therein specified, the party suing out the writ may plead thereto, to which the party making the return may reply, &c. and such further proceedings shall be had as if an action had been brought for a false return; and if a verdict or judgment be given for the person suing the writ, he shall recover damages and costs, if for the person making the return, he shall recover costs - 328
6 By 12 *Geo.* 3. c. 21. any person entitled to be admitted a citizen, &c. of any city, &c. shall apply to the proper officer for that purpose, and give notice that unless such officer shall so admit him within one month from that time, the King's Bench will be applied to for a *mandamus*; and if a *mandamus* do actually issue, in obedience to which the officer makes the admission, he shall pay costs - 329
7 Of costs upon the discharge of a rule for a writ of *mandamus* 331

MAYOR. *Vide* OFFICER, No. 2, &c.

MIDDLESEX—THE COUNTY COURT OF. *Vide* COURT OF CONSCIENCE.

MISDEMEANOR. *Vide* INFORMATION.

MONEY. *Vide* EXECUTOR, No. 7.

1 The condition of paying costs up to that time, is generally made part of the rule giving a defendant leave to pay money into court 355
2 Although a plaintiff proceeds after the payment of money into court, he will be afterwards allowed to take it out, on paying the defendant the subsequent costs 356

3 If plaintiff, after money has been paid into court, proceed to trial, and then become nonsuited, or do not recover damages beyond the sum brought into court, defendant shall have costs - 356
4 But by proceeding after payment of money into court, a plaintiff does not forfeit his right to costs up to that time, if he afterwards at any time *before* trial consent to accept it, and to stay proceedings ibid.
5 Yet if a plaintiff, after such payment, proceed actually *to trial*, when a verdict is found for the defendant, or a juror is withdrawn by consent, he is not entitled to any costs at all - 357
6 The costs of paying money into court, and taking it out, must be borne by the defendant, although he before tendered the money to the plaintiff's attorney, who then refused to accept it - 359
7 Under particular circumstances the court, in one case, gave defendant leave to bring money into court *without* costs - ibid.
8 If money be paid into court upon some of the counts only of the declaration, and the plaintiff take it out, he is, it seems, in the Common Pleas, entitled to costs on the whole declaration 362
9 But, in the King's Bench, he is, in such case, (No. 8.) entitled to no more than the costs of those particular counts - ibid.
10 How a plaintiff must proceed in case he accepts of money paid into court, and the costs are not paid up to that time 363
11 If money be taken out of court, the *plaintiff*'s attorney must procure from the master, or one of the prothonotaries, an appointment to tax the costs, and serve a copy thereof on defendant's attorney 365
12 If the defendant, pending an action on a bond, bring into court principal and interest, and all such costs as have been expended in any suit at law or in equity on such bond, he shall have judgment to be discharged. 4 and 5 *Anne*, c. 16. s. 13. 367
13 Cases upon this statute - 368, &c.

MOTION. *Vide* PRACTICE, No. 20.

N

NEW TRIAL.

1 Upon a motion for a new trial, the court will grant or refuse the costs of the former trial according to the circumstances of the case 383
2 But, in general, where a new trial is granted on the merits, or upon a new ground not opened at the first trial, or because the first verdict is against evidence, it is on payment of the costs of the former trial ibid.
3 On granting a second trial, for the misconduct of the jury on the first, the costs of such first trial were directed to abide the event of the second - - - ibid.
4 Where a verdict is against law, or the opinion or direction of the judge, a new trial will be granted *without* costs - 384
5 Other cases in which the court will grant a new trial without subjecting the party applying for it to the costs of the first trial 385
6 In one case, the court declared that if a party should obtain a verdict by an unfair unconscionable advantage, without trying the real question, they would set it aside, and make such party pay the costs 387
7 After a verdict for the crown, against the direction of the court upon

a trial at bar, in a prosecution carried on avowedly at the proper expence of the crown, the condition of paying the costs of the former trial was made part of the rule for a new one - 384

8 Where, in the rule for a new trial, nothing is said about the costs of the former, and they are not reserved to abide the event of the second verdict, although the second trial terminate in favour of the same party as the first, the court of B. R. will not allow him the costs of the first - - 395. 7

9 But under such circumstances, (No. 8.) the Common Pleas allow the costs of *both* trials - - ibid.

10 Yet where the first verdict is for the plaintiff, and the second for the defendant, or *è converso*, the costs of the first trial are not allowed even in C. B. - - - - ibid.

11 If, on a second trial, a juror be withdrawn on the party who obtained the first verdict, undertaking *to pay the other his costs*, such undertaking extends to the costs of the second trial only - 397

NOCTANTER.

1 No costs are recoverable in the proceedings upon a writ of *noctanter* 20

NOLI PROSEQUI. *Vide* DISCONTINUANCE, No. 7.

NONPROS—NONSUIT. *Vide* DEFENDANT.—EXECUTOR, No. 9. 12.—FORMA PAUPERIS, No. 7.—RECORDARI FACIAS LOQUELAM.—REPLEVIN, No. 19.

1 Debt lies in B. R. for the costs of a nonsuit in an inferior court, though they do not amount to 40*s*. - 135

2 Where after issue joined in any suit, the plaintiff neglects to bring it on to be tried, according to the course and practice of the court, judgment as in case of a nonsuit, may be given for the defendant. 14 *Geo.* 2. c. 17. - - - 398

3 And such judgments (No. 2.) shall be of the like force and effect as those upon nonsuit - - - 399

4 And defendants shall have costs thereon, in actions where they would have had them upon nonsuits - ibid.

5 A *qui tam* action where no part of the penalty is given to the crown, is within this act (No. 2.) and all the defendants in an action must join in the application for judgment as in case of a nonsuit ibid.

6 And this judgment may be given upon the traverse of the return to a *mandamus* - - - 401

7 Where, in a *joint* action, there is judgment by default against one defendant, there cannot be judgment as in case of a nonsuit for the other defendant - - 402

8 The court will not grant a motion for this judgment (No. 2.) and also for the master to tax costs for plaintiff's not proceeding to trial pursuant to notice - - 403

9 And the defendant having got a rule for this judgment, cannot afterwards have costs for not going on to trial; nor, *vice versâ*, having obtained a rule for such costs, can he afterwards have judgment as in case of a nonsuit - - 404

10 Where the court, on an application for judgment as in case of a

nonsuit, grants plaintiff further time for the trial of the issue, it is generally on payment of costs - ibid.
11 What have been deemed good causes against judgments as in cases of nonsuit - - 405
12 What, not - - - 406
13 Where a plaintiff has carried a record down to trial once, there shall not be judgment as in case of a nonsuit for not carrying it down a second time - - - 407
14 Neither shall there, where a plaintiff having once proceeded to trial, neglects to proceed to a new trial - ibid.
15 Neither an executor nor administrator is liable to costs where this judgment (No. 2.) is given against him - 407
16 Nor is the plaintiff in a writ of right - ibid.

NONRESIDENCE.

1 If the plaintiff be nonsuited in an action of debt upon the 21 *H.* 8. for nonresidence, he shall pay costs - 205

NOTICE. *Vide* INDICTMENT, No. 16.—INQUIRY.—TRIAL.

O

OFFICE—OFFICER.—*Vide* CUSTOMS.

1 By the stat. of 43 *Eliz.* c. 2. (an act for the relief of the poor) a defendant may plead the general issue, or avow generally, in a suit against him for any thing done by authority of that act, and upon a verdict for him, or a nonsuit, shall recover treble damages with costs 226
2 If any action on the case, trespass, battery, or false imprisonment, be brought against a justice of peace, mayor, &c. for any thing done by virtue of his office, such justice, &c. and all others acting in his aid, may plead the general issue, and give the special matter in evidence; and upon verdict for the defendant, nonsuit, or discontinuance, the judge, before whom the matter shall be tried shall allow unto defendant *double* costs. 7 *Jac.* 1. c. 5. - - 227
3 This act (No. 2.) extended to churchwardens, and overseers of the poor, by 21 *Jac.* 1. c. 12. - 228
4 Actions against justices of peace, mayors, &c. or any acting in their aid and assistance or by their command, for something done by virtue of their offices, shall be laid in the county where the facts were committed; if not so laid, the jury shall find the defendant not guilty; and upon a nonsuit, discontinuance, or verdict for the defendant, he shall have *double* costs. 21 *Jac.* 1. c. 12. s. 5. - 228, 9
5 No writ or copy of process shall be sued out or served on a justice of peace for any thing done in the execution of his office, without one calendar month's previous notice thereof in writing. 24 *Geo.* 2. c. 44. s. 1. - - - 229
6 And the justice may within one calendar month after such notice (No. 5.) tender amends, and, if not accepted, plead same in bar; and in case the jury find the amends tendered to be sufficient, the defendant shall have a verdict; and, in such case, or if plaintiff be nonsuited, discontinue, or there be judgment on demurrer for defen-

dant, he shall have like costs as if he had pleaded the general issue, 24 *Geo.* 2. c. 44. s. 2. - - 230

7 In default of plaintiff's proving such notice (No. 5.) at the trial, the defendant shall recover a verdict and costs as aforesaid. 24 *Geo.* 2. c. 44. s. 3. - - - ibid.

8 No action shall be brought against a constable, or other officer, or person acting by his order and in his aid, for any thing done in obedience to a justice's warrant, till a demand made of a perusal and copy of such warrant, and refusal thereof for six days; and if after compliance with such demand, an action be brought against such constable without making the justice who signed or sealed the warrant a defendant, on producing and proving the warrant at the trial, defendant shall have a verdict; and if such action be brought jointly against the justice and constable, on proof of the warrant, the constable shall have a verdict; and in case of a verdict against the justice, the plaintiff shall recover his costs against him, in which shall be included such costs as the plaintiff is liable to pay to the defendant obtaining a verdict. 24 *Geo.* 2. c. 44. s. 6. - 231

9 Where, on a verdict for the plaintiff in an action against a justice, the judge, in open court, certifies, on the record, that the injury was wilfully and maliciously committed, plaintiff shall have *double* costs, 24 *Geo.* 2. c. 44. s. 7. - - 232

10 To what actions the 43 *Eliz.* c. 2. extends - ibid.

11 How and by whom the treble damages given by this act (No. 10.) are to be assessed - - 233

12 A *deputy* constable is within 7 *Jac.* 1. c. 5. (No. 2.) and so is every person acting under a justice's warrant - 234

13 A secretary of state is not *ex officio* a justice of peace, neither are the king's messengers in ordinary, officers within the meaning of 7 *Jac.* 1. c. 5. and 24 *Geo.* 2. c. 44. - ibid.

14 An officer specified in 7 *Jac.* 1. is entitled to the benefit of that act, though sued for something done only by *colour*, and not strictly by *virtue* of his office - - ibid.

15 But a constable acting *colore officii* is not within the 24 *Geo.* 2. c. 44. which extends only to acts done *virtute officii* - ibid.

16 To bring a person within this statute (No. 15.) the act must be done in *obedience* to a warrant - - 235

17 An overseer of the poor distraining for a poor's rate under a justice's warrant is an *officer* within this act (No. 15.) - ibid.

18 This statute (No. 15.) comprehends actions of *tort* only 236

19 And the 7 *Jac.* 1. c. 5. does not extend to actions for a *nonfeazance*, but only to those for some *temporal act done*, and in which the defendant may plead the *general issue* - - ibid.

20 A defendant obtaining a verdict when sued for something done by virtue of his office, shall have double costs, though the declaration be insufficient - - - 237

21 To entitle a constable to double costs under 7 *Jac.* 1. c. 5. the judge, *who tries the cause*, must certify at the trial, that defendant acted by virtue of his office, or allow him double costs upon the record 238

22 But where there is a special verdict, and it appears, by the facts found, that the defendant was acting by virtue of his office, as justice, &c. such certificate or allowance (No. 2.) is unnecessary 239

23 Upon a *discontinuance* in an action against a justice of the peace for something done by virtue of his office, defendant is entitled to *double* costs - - - 240
24 In what cases, a defendant will be permitted to enter a suggestion upon the roll that he was acting by virtue of his office, in order to entitle himself to double or treble costs - 241
25 Where a defendant is entitled to double costs, because sued for something done by virtue of his office, the costs *de incremento*, as well as those assessed by the jury, shall be doubled - 242
26 And, in such case, if there are several defendants, they are *all* entitled to double costs - - - ibid

OVERSEER OF THE POOR. *Vide* OFFICER.—CONSTABLE.

OUTLAWRY.

What costs shall be paid upon the superseding or reversing of an outlawry - - 591, &c.

P

PARDON.

When a pardon will discharge costs in a suit in the spiritual court 599

PAUPER. *Vide* FORMA PAUPERIS.

PAYMENT OF MONEY INTO COURT. *Vide* MONEY.

PEACE, CLERK OF,

If a clerk of the peace, in drawing an indictment, insert unnecessary recitals, the court will make him pay costs. - 614

PEACE, JUSTICE OF,—*Vide* ATTORNEY, No. 4.—INFORMATION, No. 14, 15.—OFFICER, No. 2, &c.

In what cases, justices of the peace are empowered to award costs on complaints made before them out of sessions 552

PLEADING.

By 4 *Anne*, c. 16. s. 4. a defendant or tenant in any action, or plaintiff in replevin, with leave of the court, may plead several matters 105
Provided that if any such matter be, upon demurrer, adjudged insufficient, or if a verdict be found, upon any issue, for the plaintiff, costs shall be given at the discretion of the court, unless the judge certify that the defendant or plaintiff in replevin had probable cause to plead the matter found against him - ibid.
A certificate upon this statute may be made out of court, after the trial - - 122
In cases within the 4 *Anne*, c. 16. the *quantum* of the costs only is vested in the discretion of the court, and not a power of refusing costs altogether - - 107, 110, &c.
Though, in one case, it was holden, that this discretion extended to *all* the costs - - 112
If plaintiff obtain judgment on a demurrer to a special plea, he shall

have costs thereon, notwithstanding he may be afterwards *nonsuited* on the trial of the general issue - 107

7 So if one of several pleas be adjudged bad on a demurrer to the plaintiff's replication thereto, the plaintiff shall have the costs of those pleadings, though the defendant afterwards obtain a verdict upon the issues joined on the other pleas, and it should appear on the whole of the record that the plaintiff had no cause of action 108

8 Where there is a certificate on the 43 *Eliz.* c. 6. the plaintiff cannot have the costs of any plea pleaded with leave of the court, though the same be found for him, and there be no certificate on the 4 *Anne*, c. 16. 113

9 If some of several matters pleaded by a plaintiff in replevin are found for him (which entitle him to judgment), and the others for the defendant, defendant shall have the costs of the latter issues, unless there be a certificate that the plaintiff had a probable cause for pleading the matters on which such issues were joined - - 114

10 An avowant shall pay costs on the special avowries found against him, if there be no certificate of a probable cause for pleading them 117

11 Where all the issues joined on several pleas in bar are found for the plaintiff, except one joined upon an insufficient plea, which is found for defendant, the plaintiff shall have no costs on the latter plea 118

12 Two pleas, not guilty, and not guilty within six years, issue upon the first, and to the other a demurrer, which was, on argument *subsequent* to the trial of the general issue (which was found for the plaintiff), adjudged for the defendant; neither party had costs of the trial, but the defendant had those of the demurrer 119

13 Where different issues are joined on different *pleas*, some of which are found for the plaintiff, and others for the defendant, the defendant in B. R. is entitled to costs on the issues found for him; but it is otherwise in C. B. - - 121

14 But if issues be joined on several *counts*, and some of them be found for the plaintiff, and others for the defendant, the defendant shall not, in either court, have any costs - 123

15 Where a party extends the pleadings in a cause merely to harass his antagonist, he will generally subject himself to the costs of the superfluous part of the record, which will be struck out 611

16 However, though a plaintiff should insert more counts in his declaration than are necessary, the court will not order him to pay costs, if that mode of declaring is sanctioned by the general practice, in such cases - - 613

POOR. *Vide* SESSIONS, No. 1, 2. 4.

PRACTICE. *Vide* COSTS, No. 12, 13.—DECLARATION.—PLEADING, No. 15, 16.

1 In what cases, the proceedings in a suit will be stayed till a responsible plaintiff be named, or security found for the costs, in case of judgment against the plaintiff. *Vide* SECURITY.

2 The courts will stay proceedings in a second ejectment till payment of the costs of a former ejectment for the same premises, even though the merits were not decided in the former action 445

3 It was holden, in one case, that a second ejectment ought not to be stayed till the costs of a former were paid, if, in such former action no costs were payable by the plaintiff 446

4 But the contrary has been since determined 447
5 And proceedings were, in one case, stayed the very day before the trial, under particular circumstances, till payment of the costs of a former ejectment - 448
6 The courts will now stay a second ejectment until, &c. though the former ejectment was brought in a different court 449
7 If an ejectment be brought on demise of husband and wife, and afterwards a new action be instituted on the demise of the wife alone, proceedings in the latter shall be stayed until payment of the costs of the former - - - ibid.
8 So though the lessors of the plaintiff in the two ejectments should be different persons, yet if the proceedings in the second appear to be *fraudulent*, the court will not permit the latter action to proceed till the costs of the former have been paid - 450
9 Whether a second ejectment shall be stayed until the payment of the costs of a former one for the same lands, where the two ejectments are brought (without fraud or collusion) upon different demises, but upon the same title - 452
10 A second ejectment shall not be stayed, where one of the lessors of the plaintiff is in custody on an attachment for nonpayment of the costs of the former ejectment; nor where, after a verdict for the plaintiff in an ejectment, the defendant in that action brings a new ejectment against the same plaintiff, for the same premises 453
11 If the defendant, after suing out a writ of error on a judgment against him in an ejectment, bring a new ejectment for the same lands, the court will not compel him to pay the costs of the first action before he proceeds, but they will stay the second till the writ of error be determined - - - ibid.
12 But if the plaintiff bring a writ of error, and, pending it, a new ejectment, the second ejectment shall be stayed till the costs of the former are paid - - - ibid.
13 And now, though this practice was anciently confined to actions of ejectment, the courts will grant a rule to stay proceedings in a second action, of what species soever it may be, until payment of the costs of a former action, brought (though in a different court) for the same cause, and in which the *merits* were decided 454, &c.
14 And the court of B. R. has granted this rule (No. 13) under particular circumstances, in other actions than ejectments, though the merits had not been before tried - 463
15 But the court of C. B. will not, unless the merits have been tried in the first action - 465
16 Proceedings in a second action, by an executor or administrator, shall not be stayed until the costs of a discontinuance, or nonsuit in a former action, are paid - - 467
17 Neither will proceedings in an action be stayed until the debt and costs recovered by the defendant in two former actions against the plaintiff have been paid, notwithstanding the latter action should be founded on the same circumstances with the others ibid.
18 Instances wherein the costs of one action have been allowed to be deducted from, or set off against the costs, the damages and costs, or the debt and costs, in another action - ibid. &c.
19 If the holder of a bill of exchange bring separate actions against ac-

ceptor, drawer, and indorsers, the court will stay proceedings against any of the latter parties, upon payment of the bill and the costs of that particular action, but not against the *acceptor*, except on payment of the bill and the costs in all the other actions 603

20 The allowance of costs upon motions is arbitrary, and entirely in the discretion of the court - ibid.

21 In one case, the Common Pleas refused costs on denying a rule to shew cause, though it was opposed in the first instance 604

22 A declaration cannot be delivered in C. B. so as to charge the defendant with the costs thereof, before the appearance-day of the return of the writ - ibid.

23 In an action for mesne profits after a judgment by default in ejectment, it is usual for the plaintiff to recover the costs of the ejectment, as consequential damages - 614

24 But where, after a recovery in ejectment, and before an action for the mesne profits, the defendant became a bankrupt, and the jury did not include the costs of the ejectment in their verdict, in executing an inquiry in the action for mesne profits, the court refused to set aside the inquisition, because the costs might have been proved as a debt under defendant's commission - 615

PROHIBITION.

1 Writ of prohibition, what 304

2 Whether grantable *ex debito justitiæ*, or not 305

3 If either the judge or party proceed after a prohibition has been granted, they are punishable by attachment, and are liable to an action by the party injured - ibid.

4 The mode of applying for a prohibition 306

5 Every party suing for a prohibition to a suit in an ecclesiastical court for tithes or offerings, shall, before any prohibition be granted to him, deliver to some of the judges of the court to which he applies, a true copy of the libel and suggestion; and in case the suggestion be not proved by two sufficient witnesses within six months after the awarding of the prohibition, the party shall have, on request, a consultation, and also double costs and damages, to be assessed by the court granting the consultation. 2 and 3 *Edw.* 6. c. 13. s. 14. ibid.

6 These six months (No. 5.) are to be computed according to the *calendar* - 308

7 And begin to run from the *teste* of the writ of prohibition ibid.

8 It is sufficient if the suggestion be proved before a judge during vacation within six months, though not recorded till afterwards ibid.

9 Though persons attainted of felony are not good witnesses to prove a suggestion, yet persons, such as parishioners of a parish, &c. who may not be sufficient on a trial at law, are so 309

10 Defective proof of a suggestion may be supplied by better at any time within the six months, but not afterwards ibid.

11 Where a suggestion consists of two parts, one witness to each part is sufficient - - ibid.

12 It is necessary to prove a suggestion for a prohibition in a suit for *small* tithes, as well as in one for great - ibid.

13 And such proof is requisite in all cases where the matter suggested is merely matter in fact - 310

14 Proof of a suggestion by *hearsay*, or as the witness *thinks*, or *believes*, is sufficient - 311
15 So it is enough, if it be proved in substance, or in such a manner as to shew that the spiritual court has no jurisdiction ibid.
16 But where a suggestion is in the negative, or grounded upon a matter of law, no proof thereof is requisite under the statute (No. 5.) 312
17 Neither is any such proof necessary where the ground of the suggestion is a composition, or agreement, or a matter that was not, at the making of the 2 and 3 *Edw.* 6. c. 13. a sufficient cause for a prohibition - - 313
18 This statute (No. 5.) entitles a defendant in prohibition to double costs only where *a consultation is awarded in default of proving the suggestion within six months* - 314
19 Whether an administrator is liable to double costs for not proving his suggestion in due time - 315
20 By the 8 and 9 *W.* 3. c. 11. s. 3. in all suits upon prohibitions, the plaintiff obtaining judgment, or any award of execution, after plea, or demurrer, shall recover costs; and if plaintiff be nonsuited, discontinue, or have a verdict against him, defendant shall recover costs ibid.
21 Upon judgment for a plaintiff in prohibition, the costs shall be taxed from the suggestion, and so as to include those incurred by the motion - - 316
22 But the defendant, in case of a nonsuit, is not entitled to the costs of opposing the rule for the prohibition, but merely to those of the nonsuit - - 317
23 Where a prohibition is awarded as to part, and a consultation as to the residue, the plaintiff in prohibition shall have costs 318
24 So shall a defendant in prohibition, where he obtains a verdict for part only of the matter in issue - 321
25 An administrator is not liable to costs, upon a nonsuit in prohibition - - ibid.
26 If there be judgment by default in prohibition, and the plaintiff have damages upon a writ of inquiry for the contempt in proceeding after the writ of prohibition delivered, he shall have costs ibid.
27 If defendant in prohibition compel plaintiff to declare, and then plead a nugatory plea, he shall pay costs 323
28 In one case, proceedings in prohibition were stayed without costs upon application of the defendant, though the plaintiff had prepared and tendered a declaration - 324

PROVISO. *Vide* TRIAL, No. 7, 8, 9.

Q

QUARE IMPEDIT.

1 No costs are recoverable in a writ of *quare impedit* 7

QUI TAM, ACTIONS. *Vide* COMMON INFORMER.—NONSUIT, No. 5.—SECURITY, No. 11, 12.

QUO WARRANTO.

1 In case the defendant in an information in nature of *quo warranto* be found or adjudged guilty of usurping or intruding into any office or franchise within any city, &c. the relator in such information shall recover costs; and so shall the defendant, if judgment be given for him. 9 *Ann.* c. 20. s. 5. - 580

2 From the first day of *Trinity* Term, 1793, the defendants to such informations (No. 1.) for the exercise of any office or franchise in any city, borough, or town corporate, may plead the holding it six years, or more, before the exhibiting of such information; and if the issue joined thereon be found for the defendants, they shall have the like costs as if a verdict and judgment had been given for them on the merits. 32 *Geo.* 3. c. 58. - 581

3 To which plea (No. 2.) the prosecutor may reply any forfeiture, &c. of such office, within six years before the exhibiting the information. 32 *Geo.* 3. c. 58. s. 2. - - 582

4 Before the exhibiting of a *quo warranto* information, the relator ought to enter into a recognizance in 20 *l.* to prosecute the same with effect - - 582

5 And if he do not proceed to trial within a twelvemonth after issue joined, the defendant is entitled to costs to the extent of such recognizance (No. 4.) - - 583

6 So the relator shall pay costs for not proceeding to trial pursuant to notice - - 584

7 If any one of several issues in a *quo warranto* information be found for the prosecutor, upon which judgment of *ouster* is given, he is entitled to costs on all the issues - - ibid.

8 The statute of 9 *Ann.* c. 20. (No. 1.) does not extend to give costs in this sort of information, unless for the usurpation, &c. of *corporate* offices, and *rights* to *freedom* in corporations, or other *corporate* rights 585, 6

9 A defendant in execution for the contempt, and for the costs on a *quo warranto* information, is entitled to be discharged under the Lords' act - - 588

10 The court will, under circumstances, discharge a rule for a *quo warranto* information *with costs* - 589

R

RECORDARI FACIAS LOQUELAM.

1 If a defendant remove proceedings from a county court by *re. fa. lo.* into B. R. and sign a *nonpros* for plaintiff's non-appearance, he shall have costs - - 131

RELEASE.

1 The plaintiff may release part of the damages, without releasing any part of the costs assessed by the jury - 381

REMANET.

1 Whenever a cause goes down to trial, and is made a *remanet*, or goes

off upon any occasion, without the fault, contrivance, or management, of the parties, and is afterwards brought down again to trial, the costs of *both* assizes shall be allowed to the party finally prevailing 429

2 But the rule, that where a cause is made a *remanet*, the costs thereby incurred, shall attend the event of the cause, implies an exception of such particular cases as are clearly distinguished by their circumstances, from being within its reason and principle 429

REPLEADER.

1 No costs are allowed to either party upon a repleader 354

REPLEVIN. *Vide* DEFENDANT, No. 18.—PLEADING, No. 1, 2, 3, 4, 5. 9. 10.

1 Action of replevin, what - 264

2 The nature of the ancient writ of replevin, and the inconveniences attending that process - - 265

3 The sheriff by the statute of *Marlberge* upon *plaint* made to him may grant a replevin - - ibid.

4 The writ of *second deliverance* - - 266

5 A plaintiff in replevin, where he recovers damages, is entitled to costs 270

6 And a defendant therein avowing or making cognizance for any rent, custom, service, or for damage-feasant, or other rent or rents, shall recover damages and costs where he prevails or the plaintiff is barred, 7 *Hen.* 8. c. 4. s. 3. 21 *Hen.* 8. c. 19. s. 3. - 267

7 And now by the 4 *Jac.* 1. c. 3. and 8 and 9 *W.* 3. c. 11. such defendant is entitled to costs wherever judgment is given in his favour on demurrer, verdict, or nonsuit, be the cause for which the distress was taken what it may - - 273

8 Where a plaintiff in replevin, upon a distress for *rent*, is nonsuited before issue joined, the defendant, making a suggestion in nature of an avowry or cognizance, for arrearages of rent, shall, upon his prayer, have a writ to inquire of such arrears and the value of the goods; and on the return of such writ shall have judgment for the arrears of the rent, if the goods distrained are of that value; and if not of that value, for so much as they are worth, with full costs of suit. If plaintiff be nonsuited after issue joined, or there be a verdict against him, the jury impanelled to try the issue, shall inquire of the arrears, and the value of the goods distrained, &c. 17 *Car.* 2. c. 7. s. 2. 268

9 And if judgment be given upon demurrer for the avowant or person making cognizance for rent, a writ shall be awarded to inquire of the value of the distress, &c. 17 *Car.* 2. c. 7. s. 3. 269

10 Upon distresses for rent, quit-rents, reliefs, heriots, and other services, defendants in replevin may avow or make cognizance generally, and shall have *double* costs, if they obtain judgment. 11 *Geo.* 2. c. 19. s. 22. 270

11 Whether there shall be any costs where there are several issues joined on an avowry, part of which are found for plaintiff, and the residue for defendant - - 274

12 A defendant in replevin is not entitled to costs, upon a judgment on a confession of the plea of *prisal en auter lieu* - 275

13 An executor or administrator avowing under the 32 *H.* 8. c. 37. is entitled to costs - - - 276
14 There shall be costs after judgment upon a *special*, as well as upon a general verdict, in replevin - - ibid.
15 If a plaintiff in replevin, on an avowry for a *seizure* for a heriot-*custom*, be nonsuited, the avowant is not entitled to *double* costs under the 11 *G.* 2. c. 19. (No. 10.) - - ibid.
16 In replevin both plaintiff and defendant are actors, therefore either party may carry the cause down to trial; and if defendant do not proceed to trial pursuant to his notice, he shall pay costs ibid.
17 There cannot be judgment as in case of a nonsuit in an action of replevin - - 276, 7

REQUESTS. *Vide* COURT OF CONSCIENCE.

RIGHT, WRIT OF. *Vide* NONSUIT, No. 16.

RIOTERS. *Vide* HUNDRED, No. 1.

S

SCANDALUM MANGNATUM.

1 No costs are recoverable in this species of action - 40

SCIRE FACIAS.

1 Writ of *scire facias*, what - - 301
2 In what cases it lay at common law to revive a judgment, when execution had not been sued out within a year and a day after the entry of the judgment - - 302
3 This writ introduced in personal actions by statute of *Westminster* 2. ibid.
4 And is in the nature of an action - - 303
5 By 8 and 9 *W.* 3. c. 11. s. 3. in all suits upon writs of *scire facias*, the plaintiff obtaining judgment, or any award of execution after plea or demurrer, shall recover costs; as shall the defendant in case the plaintiff be nonsuited, discontinue, or have a verdict against him ibid.
6 This statute does not extend to *executors* or *administrators* ibid.
7 No costs are payable where a writ of *scire facias* is quashed before plea pleaded; or abated by plea - - 303, 4

SECRETARY OF STATE. *Vide* OFFICER, No. 13.

SECURITY.

1 The courts will, on motion, stay proceedings in an ejectment, on the demise of an *infant*, until a responsible lessee be named, or security given for the costs in case of a nonsuit or a verdict for the defendant 439
2 So a similar rule (No. 1.) will be made where the lessor of the plaintiff *resides abroad* - - ibid.
3 So where the lessor of the plaintiff dies pending the suit, the court will oblige the plaintiff to find security for the costs 439, 440
4 So where an action for mesne profits is brought in the name of the nominal plaintiff in ejectment - - 449

5 But such security will not be required in an ejectment on account of the poverty of the plaintiff's lessor, nor because such lessor in a former ejectment for the same premises, in another court, had been obliged to give security for the costs of that action 440
6 Neither will the court order a lessor of the plaintiff, having privilege of parliament, to name a responsible plaintiff - 441
7 In one case, however, it is said the Exchequer obliged the lessor of a plaintiff in ejectment to give security for costs on it's being stated to the court, that he could not be found - 442
8 B. R. will now, though it was anciently otherwise, stay proceedings in any species of action, where the plaintiff resides abroad, or in *Ireland*, till security be given for the costs - ibid.
9 But C. B. will not exact such security merely because a plaintiff is in a foreign country, without other concurring reasons, as that he went thither to avoid paying his debts, or that he is insolvent, or the like 443
10 And security for costs will not be required either on the ground of the plaintiff's being a foreigner, or insolvent, if he *reside* in *England* 444
11 Except, perhaps, in a *qui tam* action, where the plaintiff is a foreigner, though resident in *England* - ibid.
12 And if a prosecution on a penal statute be brought in a feigned name, the court will oblige the real prosecutor to give security for costs, but not because the plaintiff, in such action, is *poor* 445

SESSIONS.

1 Justices of the peace at their general or quarter sessions, upon any appeal relative to the settlement of the poor, shall award costs to the prevailing party. 8 and 9 *W.* 3. c. 30. s. 3. - 554
2 Persons aggrieved by the poor rates, &c. upon notice to the churchwardens or overseers of the poor, may appeal to the next sessions, which is authorized to determine such appeal, and award costs to the party for whom such appeal shall be determined. 17 *Geo.* 2. c. 38. s. 4. - - 555
3 And persons aggrieved by any thing done under the highway and turnpike acts may appeal to the quarter sessions, &c. 557
4 An indictment lies for not paying costs awarded by an order of sessions 558

SET-OFF. *Vide* COURT OF CONSCIENCE, No. 12.—ATTORNEY, No. 18.

1 In what cases the costs of one action shall be set-off against those of another - - - 467, &c.

SLANDER. *Vide* JUDGMENT, No. 1.

1 If on a trial, or the execution of a writ of inquiry, in an action for slanderous words, the damages be found or assessed under 40*s.* the plaintiff shall have no more costs than damages. 21 *Jac.* 1. c. 16. s. 6. 31
2 But the jury are not restrained by this act from assessing costs to any amount, in an action for slanderous words, though they may find damages under 40*s.* - - 32
3 An action for slander of title is not within 21 *Jac.* 1. c. 16. ibid.
4 In an action for words in themselves *not* actionable, the plaintiff is entitled to full costs, however small the damages may be 32

5 So he is, where in an action for words in themselves actionable, a substantive injury is alleged in the declaration - 33
6 But in an action for words actionable in themselves, the plaintiff cannot have more costs than damages, if the latter are under 40*s*. 34
7 Courts baron, and other inferior courts are not within the 21 *Jac.* 1. c. 16. - - 38
8 Unless the plaintiff recover 40*s*. damages in an action of slander, commenced in an inferior court, but removed by *hab. corp.* he cannot have full costs - - - 39
9 A plea of justification in an action of slander, will not take it out of the 21 *Jac.* 1. - - ibid.

SPECIAL JURY.

1 The costs of a special jury were, formerly, always paid by the unsuccessful party - - 433
2 But by 3 *Geo.* 2. c. 25. s. 16. the party applying for a special jury shall pay the fees for striking such jury, and shall not be afterwards allowed the same in his costs - ibid.
3 And by 24 *Geo.* 2. c. 18. s. 1. the party applying for a special jury shall also pay all the expences occasioned by the trial of the cause by such jury, and shall not have any other allowance for the same upon taxation of costs than as for a common jury, unless the judge shall, after the trial, certify, in court, under his hand, on the record, that the cause was proper to be tried by a special jury - 434
4 And no special juryman shall be allowed more than the judge trying the issue shall think just, not exceeding one guinea, except where a view has been had - - ibid.

STATUTES.

1 In action of debt upon any statute by a *party grieved* for a *certain* penalty, costs are recoverable, though the statute does not mention them - - 17. 201
2 But no costs can be recovered by a *common informer*, or prosecutor *qui tam*, except costs are expressly given by the statute inflicting the penalty - - 19. 200
3 The statutes giving costs are not to be extended beyond the letter, but to be construed strictly - - 623

TABLE OF THE STATUTES CITED AND OBSERVED UPON.

HENRY III.—52 H. 3. c. 6. (Marlb.) - 2. 124
EDWARD I.—6 Edw. 1. c. 1. (Gloucest.) - 4. 9
13 Edw. 1. c. 5. s. 3. (st. Westm. 2.) - 7
13 Edw. 1. c. 46. - - 20
HENRY IV.—2 H. 4. c. 11. - - 8. 475
HENRY VI.—8 H. 6. c. 9. s. 6. - - 475
HENRY VII.—3 H. 7. c. 10. - - 279
11 H. 7. c. 12 - - 210
HENRY VIII.—7 H. 8. c. 4. s. 3. - 267
21 H. 8. c. 19. s. 3. - - ibid.
23 H. 8. c. 15. s. 1. - 124
23 H. 8. c. 15. s. 2, - - 211
24 H. 8. c. 8. - - - 21. 135
33 H. 8. c. 39. s. 54 - - 21

EDWARD VI.—2 and 3 Edw. 6. c. 13. s. 14. - 306
5 Edw. 6. c. 14. - - - 7
PHILIP and MARY.—1 and 2 P. and M. c. 12. 6. 476
ELIZABETH.—8 Eliz. c. 2. - - 136
18 Eliz. c. 5. s. 3. 6, 7. - - 201, 2
27 Eliz. c. 10. - - ibid.
27 Eliz. c. 13. (hue and cry) - 10. 12
31 Eliz. c. 11. s. 3. - - 525
43 Eliz. c. 2. s. 19. - - 226
43 Eliz. c. 6. s. 2. - - 22
JAMES I.—3 Jac. 1. c. 7. s. 1. - - 491
3 Jac. 1. c. 15. s. 2. - - 153, &c.
4 Jac. 1. c. 3. - - - 125
7 Jac. 1. c. 5. - - - 227
21 Jac. 1. c. 8. - - 526, n. (1)
21 Jac. 1. c. 12. s. 3. - - 228
21 Jac. 1. c. 12. s. 5. - - ibid.
21 Jac. 1. c. 16. s. 6. - - 31
CHARLES II.—12 Car. 2. c. 24. - - 3
13 Car. 2. stat. 2. c. 2. - 137. 280
15 Car. 2. c. 11. s. 19. - - 247
16 and 17 Car. 2. c. 8. s. 1. - 621
17 Car. 2. c. 7. s. 2, 3. - 268, 9
23 and 24 Car. 2. c. 9. - 26. 40
31 Car. 2. c. 2. s. 5. - - 17
WILLIAM and MARY.—2 W. and M. sess. 1. c. 5. s. 4. 477
4 and 5 W. and M. c. 18. - - 570
4 and 5 W. and M. c. 23. s. 7. - 561
4 and 5 W. and M. c. 23. s. 10. - 90
5 and 6 W. and M. c. 11. - - 526, 7
WILLIAM III.—8 and 9 W. 3. c. 11. s. 1. - 142
8 and 9 W. 3. c. 11. s. 2 - - 148. 281
8 and 9 W. 3. c. 11. s. 3. - 297. 299. 303. 315
8 and 9 W. 3. c. 11. s. 4. - 102
8 and 9 W. 3. c. 30. s. 3. - 554
11 and 12 W. 3. c. 9. s. 1. - 23. 46
ANNE.—4 Ann. c. 16. s. 4, 5. 7. - - 105
4 Ann. c. 16. s. 13. - - 367
4 Ann. c. 16. s. 25. - - 280
5 Ann. c. 14. s. 2. - - 561
8 Ann. c. 7. s. 63 - - 243
9 Ann. c. 20. - - - 328
9 Ann. c. 20. s. 5. - - 580
GEORGE I.—1 Geo. 1. stat. 2. c. 5. s. 6. (riot act) 9
5 Geo. 1. c. 13. - - 351
6 Geo. 1. c. 21. s. 39, 40, 41. 43. - 244, &c.
9 Geo. 1. c. 22. s. 7. - - 13
GEORGE II.—2 Geo. 2. c. 23. s. 23. - 492
3 Geo. 2. c. 25. s. 16 - - 433
5 Geo. 2. c. 19. s. 2, 3. - 562, 3
8 Geo. 2. c. 16. s. 1. - 16. n. (1)
11 Geo. 2. c. 19. s. 22. - 270

GEORGE II.—12 Geo. 2. c. 13. s. 5. 6. - 493
13 Geo. 2. c. 18. s. 5. - - 563
14 Geo. 2. c. 10. s. 1. - 155
14 Geo. 2. c. 17. s. 1. 5. - 398. 408
15 Geo. 2. c. 31. s. 7. - 243
17 Geo. 2. c. 38. s. 4. - 555
19 Geo. 2. c. 34. s. 16. - 248
22 Geo. 2. c. 47. - - 159
23 Geo. 2. c. 27. - - 169
23 Geo. 2. c. 30. - - 156
23 Geo. 2. c. 33. - - ibid.
24 Geo. 2. c. 18. s. 1, 2. - - 434
24 Geo. 2. c. 44. s. 1, 2, 3. 6. 7. - 229, &c.
GEORGE III.—10 Geo. 3. c. 50. s. 3. - 602
12 Geo. 3. c. 21. - - 329
13 Geo. 3. c. 78. s. 64 - - 525
13 Geo. 3. c. 78. s. 80. - 556
13 Geo. 3. c. 84. - - 557
16 Geo. 3. c. 30. s. 19. 21. 23. - 559. 560
18 Geo. 3. c. 19. s. 1, 2. 9. - 552, 3
18 Geo. 3. c. 19. s. 5. - - 557
23 Geo. 3. c. 70. s. 29. - 248
23 Geo. 3. c. 70. s. 34. 31, 32, 33. - 251, &c.
24 Geo. 3. c. 47. s. 35. - 250
25 Geo. 3. c. 50. s. 28. - 478
26 Geo. 3. c. 40. s. 31. - - 250
28 Geo. 3. c. 37. s. 24. 23. 26, 27, 28. - 251, &c.
32 Geo. 3. c. 58. - - 581

STAYING PROCEEDINGS TILL SECURITY FOUND FOR THE COSTS. *Vide* SECURITY.

STAYING PROCEEDINGS IN A SECOND ACTION, TILL THE COSTS OF A FORMER ARE PAID. *Vide* PRACTICE.

SUGGESTION. *Vide* DOUBLE OR TREBLE COSTS, No. 4.—OFFICER, No. 24.—PROHIBITION, No. 5, &c.

T

TAXATION.

1 Up to what time the costs, in a civil action, are to be taxed 624
2 By whom, and the mode in which, this taxation is performed 624, 5

TENDER. *Vide* COURT OF CONSCIENCE, No. 13.

1 Where the plaintiff accepts the money brought into court upon a plea of tender, the defendant is entitled to costs - 355
2 But in debt upon a bond the plaintiff must have costs, though the money was tendered before action brought - 594

TITHES.

1 By 8 and 9 *W.* 3. c. 11. s. 3. in all actions of debt upon the statute for

not setting forth of tithes, wherein the single value found by the jury shall not exceed 20 nobles, the plaintiff obtaining judgment, or any award of execution after plea or demurrer, shall have costs; and if he be nonsuited, discontinue, or have a verdict against him, the defendant shall have costs - - 299

1 To entitle a plaintiff to costs in this action, the single value of the tithes not set out must be found *by a jury* not to exceed twenty nobles 300

2 And if the single value so found *exceed* that sum, there shall be no costs - - - ibid.

TOWER-HAMLETS.

The *Court* of the *Tower-Hamlets*, *vide* COURT OF CONSCIENCE.

TRESPASS.

Vide CERTIFICATE, No. 2. DAMAGES, No. 12, 13, 14, 15, 16, 17.—INFERIOR TRADESMEN.—WILFUL AND MALICIOUS TRESPASS.

1. By the 22 and 23 *Car.* 2. c. 9. in all actions of trespass, and other personal actions in which the judge shall not certify, at the trial, upon the record, that the freehold or title of the land mentioned in the declaration was in question, the plaintiff, if the damages are under 40*s.* shall have no more costs than damages - - 41

1 A plaintiff cannot have full costs in any action of trespass *quare clausum fregit*, in which the freehold or title *might* by possibility come in question, should the damages be found under 40*s.* without a certificate pursuant to this statute - - 65, &c.

2 But if it be apparent from the pleadings, or the nature of the case, to be impossible that the freehold or title could be in litigation —or that it must have been so, the plaintiff shall have full costs, though there be no certificate and the damages under 40*s.* 70. 84

4 So a certificate is unnecessary, where the declaration contains several counts, one of which relates to a trespass upon land, and another charges an injury to, or asportation of a personal chattel, and a verdict is found upon the whole with entire damages for the plaintiff 73

5 When a certificate is requisite, where an *asportavit* of property is joined in the *same* count with a trespass upon land, and a general verdict is found for the plaintiff - - 74, &c.

6 If in trespass *quare domum fregit et bona asportavit*, the defendant be found guilty of the taking the goods only, and acquitted as to the rest, plaintiff shall have full costs without a certificate - - 79

7 So he shall where he obtains a general verdict on a count, which contains a trespass upon land, and also an injury to *personal* property, charged *as a substantive independent fact* - 80, &c.

8 But should that part of the declaration charging an injury to or *asportavit* of personal property be found for the defendant, there must be a certificate to entitle plaintiff to full costs, unless the damages are above 40*s.* - - - 83

9 So there must, where in trespass *quare clausum fregit* the defendant pleads not guilty, and a justification, the former of which is found for plaintiff with damages under 40*s.* and the latter for defendant 89

TRIAL. *Vide* EXECUTOR, No. 10.—FORMA PAUPERIS, No. 6.—INFORMATION, No. 10, 11, 12.—NEW TRIAL.—NONSUIT.—REPLEVIN, No. 16.

1 If a plaintiff do not proceed to trial pursuant to his notice, the defendant shall have the costs of his attendance, unless such notice be countermanded in due time - - 408, 9

2 Although a plaintiff be prevented from trying the cause, by the defendant's entering a *ne recipiatur*, yet he shall pay costs 409

3 But he shall not, where his not going on to trial was the effect of inevitable accident, and not of any wilful *laches*, or proceeded from the defendant's attorney - - ibid.

4 If a notice of trial be regularly countermanded, defendant is not entitled to the costs of a witness who set off for the assizes, before the delivery of the countermand - - 410

5 In ejectment the lessor of the plaintiff shall pay the costs for not proceeding to trial according to notice - 411

6 A second trial will not be stayed till the payment of the costs taxed for the plaintiff's not proceeding to a former trial, except in ejectment ibid.

7 Yet, in one case, the Common Pleas did so, where defendant had given two notices of trial by proviso, and was a pauper ibid.

8 A defendant is liable to costs for not going to trial by proviso according to notice - - - 411

9 And if defendant give such notice (No. 8.) and plaintiff also give notice of trial, and neither of them proceed to trial, each party is entitled to costs against the other - ibid.

10 Notwithstanding a plaintiff may have undertaken peremptorily to proceed to trial at the next assizes, it is necessary for him to give *notice of trial* - - - - 409

TROVER. *Vide* EXECUTOR, No. 4, 5, 6.

V

VERDICT.

1 If there are several counts in a declaration, and the plaintiff obtains a verdict on one count only, he is entitled, in the Common Pleas, to costs on the *whole* declaration - 37

2 And that, not only where the substantial cause of action is the same in all the counts, but also where the different counts contain different and distinct causes of action - 37

3 But it is otherwise in the King's Bench, where, if issues are joined on several counts, and in some a verdict is found for the plaintiff, and on others, for the defendant, the former is not entitled to costs on that part of the record on which a verdict is found for the defendant 37

4 Neither is the defendant in such case (No. 3.) entitled to costs on those counts upon which the verdict is found for him ibid.

5 Yet where there were two distinct causes of action in two different counts, upon one of which there was judgment by default, and upon the other a verdict for the defendant, the court of B. R. held that de

fendant should have judgment for his *costs* on the latter count, and plaintiff judgment for his costs on the former 376
6 And, in one case, where, after issue and demurrer joined, there was a verdict on the trial of the issue for the plaintiff, and, afterwards, judgment on the demurrer for defendant, the Common Pleas ordered costs to be taxed on both sides - 378
7 If, in trespass, the declaration consist but of *one* count, part of which defendant justifies, and plaintiff then new assigns, without taking issue on the special plea of justification, and on the trial obtains a verdict, he is entitled to the costs of the whole record 379

W

WASTE.

1 Against what tenants an action of waste was maintainable at common law - - 8. 296
2 Formerly, no costs were recoverable by the plaintiff in an action of waste against a tenant for life, or a tenant for years 8. 297
3 But he might recover costs in waste against a guardian, tenant in dower, or by the curtesy - ibid.
4 And where the plaintiff failed in an action of waste against any of the persons last named (No. 3.) the defendant, since the 4 *Jac.* 1. c. 3. has been entitled to costs - 298
5 And now, by 8 and 9 *W.* 3. c. 11. s. 3. in all actions of waste, wherein the single damage, found by the jury, shall not exceed the sum of twenty nobles, the plaintiff, obtaining judgment, or any award of execution after plea or demurrer, shall recover costs; as shall the defendant, if plaintiff be nonsuited, discontinue, or have a verdict against him - - 297
6 In waste against a tenant by the curtesy, or in dower, plaintiff is entitled to *treble costs*, as well as treble damages - 298

WESTMINSTER.

The *Court of Requests* for *Westminster*.—*Vide* COURT OF CONSCIENCE, No. 20, 21, 22.

WILFUL AND MALICIOUS TRESPASS.

1 In all actions of trespass, wherein the judge shall certify, on the record, that the trespass was *wilful and malicious*, the plaintiff shall recover not only damages, but full costs of suit. 8 and 9 *W.* 3. c. 11. 102
2 This certificate must be made in court, at the trial 105
3 What shall be deemed a wilful and malicious trespass 104
4 Whether a certificate may be granted upon this statute in other actions of trespass, than that of *quare clausum fregit* 103, 4

WITNESS.

1 The expences of a witness who was *subpœnaed*, and actually attended at the trial, though never examined, ought to be allowed in the taxation of costs - - 435

2 So ought the costs of a material witness, who attended at the trial, and was examined, though not *subpœnaed*, and the costs also of such witness *subpœnaed*, though he never attended 43
3 And, it is said, the Common Pleas will allow the costs of a material witness, who attended the trial, though neither *subpœnaed* nor examined - - ibid
4 But that the King's Bench will not allow any costs for a witness unless he was either *subpœnaed* or examined - ibid
5 No costs shall be allowed on account of a witness of the defendant, who between notice of trial, and a regular countermand thereof, set off to attend the assizes - - 43
6 The contingent losses which witnesses may have sustained by obeying a *subpœna*, cannot be allowed in the taxation of costs ibid
7 The costs of examining witnesses upon interrogatories are always borne by the party obtaining the rule for such examination, and do not unless so ordered, abide the event of the cause - 43

APPENDIX.

CHAP. I.

SECT. I.

Of a Plaintiff's Right to Costs, under the Statute of Gloucester, 6 Edw. 1. c. 1.

UPON a recovery in an action against a sheriff for not taking bail, pursuant to the 23 *Hen.* 6. *c.* 9. the plaintiff, the party grieved, is entitled to costs. Page 17, 19.

THUS, an action upon the case was brought against the defendant, as sheriff of the county of *Lancaster*, wherein the declaration stated that the plaintiff was in custody of the defendant's bailiff by virtue of a writ of *capias ad respondendum*, at the suit of one J. S. G. which was endorsed for bail for ten pounds; that the plaintiff afterwards offered to the said bailiff reasonable sureties of sufficient persons to become bail for his appearance at the return of the writ, which the bailiff refused to accept, and wrongfully detained the plaintiff, &c. for the space of twenty hours after such tender of the bail, &c. against the form of the statute, &c.—The defendant pleaded the general issue. The plaintiff obtained a verdict at the trial with forty shillings damages; and a rule was obtained calling upon the plaintiff to Creswell v. Hoghton, B. R. T. 35 G. 3. 6. T. R. 355.

shew cause why the master should not be restrained from taxing the plaintiff his costs.

In shewing cause against this rule, it was said that the objection in this case was founded principally on *Pilfold's* case (a), where it was laid down that the statute of *Gloucester* was confined to cases where the plaintiff could recover damages either before or by that act. But the 23 *Hen* 6. did not create the damages in this case; for though it gives treble damages to the party grieved, yet he might have recovered damages against the sheriff at common law for a breach of his duty, by which he the plaintiff was damnified; and therefore in this respect that statute was only accumulative. And though the sheriff was not obliged, before the 23 *Hen.* 6. to take bail upon an arrest, unless the party sued out a writ of mainprize, yet he was obliged, even before that act, to take sureties for appearance where the party did sue out such writ. 1 *Bac. Abr.* 205. The only difference, therefore, made by the statute, was to remove the necessity of suing out the Writ. *Fitzh. N. B.* Writ of *Mainprize*, 565.

(a) 10 Co. 116.

Lord Kenyon, *Chief Justice.*—I have not yet heard any answer to the proposition laid down by the plaintiff's counsel, that the party, in such a case as the present, might have recovered damages before the statute of *Gloucester*, provided he took the proper means to compel the sheriff to take bail, namely by suing out a writ of mainprize. Of the case of *Witham* v. *Hill*, I have a fuller note than any in print. [His Lordship read his own manuscript note of that case; at the conclusion of which

2 Wils. 91.

Lord *Ch. Just.* WILLES said, I agree that where a statute, subsequent to that of *Gloucester* gives an action in a case where no damages *were sustained* before, the plaintiff is not entitled to costs; but in all cases where the party sustains a damage, and a subsequent statute gives the remedy, the party is entitled to costs.] Therefore, I am of opinion, that wherever the party has sustained damage, and a new act gives another remedy, such a party may recover costs as well as damages. In such a case as the present, before the statute *Hen.* 6. if the sheriff did an injury to the party arrested, by not taking bail, the latter had a remedy against the sheriff; for, in general, wherever an injury is done by one person to another, a right of action accrues to that other. And though a preliminary step was to be taken by the party arrested, to compel the sheriff to take bail before the statute of *Henry* 6. as suing out a writ of mainprize, yet after having taken that step, the party might have maintained an action against the sheriff, and recovered damages, &c. All that this statute did, was to clear the way, to take away the necessity of suing out a writ of mainprize, and to give treble damages to the party grieved; but as the party sustained damages before, and might have maintained an action against the sheriff, the costs are given by the statute of *Gloucester*. Several cases, however, have been mentioned by the defendant's counsel, to shew that the plaintiffs cannot recover costs in those actions, because the actions were given by statutes subsequent to the statute of *Gloucester*: but in those the party had no right of action before. The case of a *quare impedit* was considered as a question of mere spiritual concern. So in the case of tithes; they could not be recovered in the temporal courts before the

reign of *Edw.* 6. But those cases are distinguishable from the present; where, before the statute of *Gloucester*, damages might have been recovered; and then the costs follow by that act.

GROSE, *Justice.*—I cannot add to what my Lord Chief Justice has said. The whole question turns on this; whether the statute 23 *Hen.* 6. created the damages in this case? I think it did not, for if the party had sued out a writ of mainprize, and the sheriff had refused to take bail, the former might have maintained an action against the latter; and that brings this case within all the authorities.

LAWRENCE, *Justice.*—Considering the statute of *Hen.* 6. as not creating the damages, this determination will not contradict *Pilfold's* case. It is a general principle that where an act of parliament imposes a duty, and any person is prejudiced by the non-performance of it, the party injured may recover damages and his costs. This has been the practice under many acts of parliament passed since the statute of *Gloucester.* Here the act of parliament imposed a duty on the sheriff to take bail; and for the non-performance of that by the sheriff, the party grieved is entitled to recover damages and costs. In the case of penalties, a distinction has been taken between those cases where the penalty is given to the party grieved, and those where it is given to a common informer. That distinc-
Page 17. tion was taken in *Ward* v. *Snell*; where the court said, the instant a thing was done which occasioned the penalty, it was a debt at common law: so here, if the sheriff did not do his duty by taking bail, an action might have been brought

against him before the statute of *Gloucester*, and, consequently, the plaintiff is entitled to his costs under that act.

Rule discharged.

SECT. II.

Where there shall be no more costs than damages, when the latter are found under forty shillings.

THE statute 21 *Jac.* 1. *c.* 16. s. 6. does not extend to *libels*, but is applicable only to *words* spoken. Therefore if the plaintiff, upon the execution of a writ of inquiry, after judgment by default, in an action for a libel, obtain only one shilling damages, he will be entitled to full costs.

Page 32, Libel.

Greaves v. Warner. B. R. T. 24 G. 3.

IN this action for words, the declaration contained five counts. The first, second and fourth, were for words spoken of the plaintiff in his trade or business of an auctioneer, and were clearly actionable. The third and fifth counts, without any *colloquium* of the plaintiff's trade, stated the words to be "*you are a swindler*;" and special damage was laid by reason of the speaking, which said several words in the declaration, &c. &c. Plea, General issue. Verdict for the plaintiff on the whole declaration, with one shilling damages.

P. 32, &c. Slanderous words.

Savile v. Jardine. C B. T. 35 G. 3. 2 H. Bl. 531.

UPON a rule for the prothonotary to tax the plaintiff his full costs, though the damages were under forty shillings.

THE Court were of opinion, that the word *swindler* is not actionable, and that, therefore, the plaintiff was entitled to full costs, because the verdict being general, some damages were intended to be given on each count; and as the words in the third and fifth counts were not actionable, the damages, in respect of those counts, were given for the special damage.

Page 40. Scandalum Magnatum.

B.R.H. 17 G. 3.

IN Lord *Bolingbroke* v. *Woodfall*, which was an action of *scandalum magnatum*, it was adjudged that the plaintiff should have costs, contrary to 2 *Show.* 506.

SECT. III.

Where there shall be full Costs, although the Damages recovered are under Forty Shillings, and where not.

Page 54. &c. Assault and Battery.

THE court of King's Bench have recently holden, in conformity with the practice in the Common Pleas, that, although a count for an assault and battery, charges a tearing of the plaintiff's clothes as a substantive fact, the plaintiff is not, on a general verdict in his favour, entitled to more costs than damages, where the latter are under forty shillings, unless the tearing of the clothes was at a different time, and not a part of the same transaction.

B. R. H. 34 G. 3. 5 T. R. 482.

THUS in *Lockwood* v. *Stannard*, the declaration, after alleging in the usual form, that the defendant assaulted the plaintiff, stated, in the same count, that "the defendant then "and there with force and violence tore, rent, and damaged,

"the plaintiff's clothes, which the plaintiff then and there "wore, &c." Plea, the general issue. Verdict for the plaintiff, with one penny damages. And the master having taxed the plaintiff his full costs,

A MOTION was made to set aside the taxation. In support of the plaintiff's right to full costs, the case of *Cotterill* v. *Tolly*, was relied on. Page 56.

BUT the Court said that the contrary had been since determined in the Court of Common Pleas, where the rule was established, that unless the tearing of the clothes were at a different time, the plaintiff should have no more costs than damages, if he recovered less than forty shillings; and that in this case the tearing of the clothes was evidently a part of the same transaction.

Rule absolute.

IF, to an action for an assault and battery, the defendant plead a justification to the whole, which is found against him, the plaintiff will be entitled to full costs, although the damages should be under forty shillings, and the judge should not have certified that the assault and battery were proved. Page 62. Assault and Battery.

THUS, to trespass for assaulting the plaintiff, and seizing, grasping him by the breast and shoulders, and dragging, pulling and hauling him with great force, the defendant pleaded, first, the general issue; and secondly, as to the assaulting, seizing and grasping the plaintiff, and dragging, pulling and Smith v. Edge. B.R.H.36 G.3. 6 T. R. 562.

hauling him about, he pleaded a justification;—in which he stated, that there was a custom for the inhabitants of *Manchester* to hold a vestry meeting in a certain place in the parish church, where the parish table stands, on *Tuesday* in *Easter* week, to nominate and appoint churchwardens; that the defendant was one of the inhabitants present at a meeting held on, &c. and that the plaintiff wrongfully prevented the parishioners proceeding towards the said nomination, made a great noise and disturbance there, and interrupted the business; that the defendant requested the plaintiff to desist, which the other refused, &c. whereupon the defendant gently laid his hands on the plaintiff to remove him from the place in the parish church where the meeting was held, and then and there gently removed him from the said place for the cause aforesaid; which is the same trespass and assault in the declaration and in the introductory part of this plea mentioned, &c. To this the plaintiff replied *de injuriâ suâ propriâ*, &c. On the trial, a verdict was given for the plaintiff on both the issues, with one farthing damage. The master, in taxing costs, refused to allow the plaintiff his full costs; whereupon

Chambre moved, that the master might be directed to review his taxation, and to allow the plaintiff his full costs.

Lord Kenyon, *Chief Justice*.—The question is whether laying hold of the plaintiff in the church at *Mancheter*, and turning him out neck and heels, be or be not a battery. This case is very distinguishable from that of *Page* v. *Creed*, where the justification was confined to the assault; there, a battery

Page 63.

being neither certified by the judge, or admitted by the defendant, it was rightly determined that the plaintiff who had recovered damages under forty shillings, was not entitled to more costs than damages. But here the plea justifies the battery as well as the assault: and where the justification goes to the battery, it has been the usage, at all times, without any contradiction, to allow the plaintiff his full costs. We are now told, however, that that practice is not warranted by law, and are desired to overturn every thing that has been done upon the subject from the time of Lord *Holt* to the present moment. But I think that the true construction of the statute 22 and 23 *Car.* 2. is this; if it do not appear on the record that a battery was committed, there must be a certificate from the judge to entitle the plaintiff to his full costs: but if it do appear on the record, then there is no necessity for a certificate to certify that which does so appear. If this were *res integra*, I should think it proper to decide this point in favour of the plaintiff; but in addition to the reason of the thing, there is the universal practice that has prevailed in the courts of law.

Ashhurst, *Justice.*—I cannot say that this practice, which has obtained, would not have been warranted at the first; but at any rate I think it would be extremely wrong now to overturn it.

Grose, *Justice.*—Where a battery is not admitted on the record, the judge must certify to give the plaintiff his full costs, but where the defendant admits a battery, no certificate is necessary. Then it is argued that the battery is not justified

in this case, but observe how the defendant has pleaded: "as "to the assaulting, seizing, grasping, dragging, pulling and "hauling the plaintiff, &c. he (the defendant) gently laid his "hands on him, and gently removed him from the place, &c." the evident meaning of which is, that he removed the plaintiff from the place, &c. by seizing, grasping, and dragging him, &c.

4 *Ann.* c. 16. s. 4.

LAWRENCE, *Justice.*—It seems to be admitted, that before the statute of *Anne*, the plaintiff was entitled to full costs, when the battery was admitted on the record; and that statute which was passed for other purposes, did not make any alteration in this respect. Then did the defendant admit a battery in this case? The meaning of the plea is to be collected from the introductory part of it; he meant to justify what he introduced in the plea; and in this way of considering it, there is no doubt about the extent of the defendant's admission in the plea of justification.

Rule absolute.

Page 67. Trespass.

Adlem v. Grinaway B. R. P. 35 G. 3. 6 T. R. 281.

IN trespass, the declaration stated, that the defendant, with force and arms, flung and threw divers stones and brickbats, &c. at and against the windows of the plaintiff, of and belonging to a certain messuage, or dwelling house of him the said plaintiff, situate at, &c. and then and there with the said stones, &c. broke to pieces, shattered and destroyed divers, ss. 200 panes of glass, &c. of and belonging to the said windows, of great value, &c. and other wrongs, &c. against the peace, &c. The defendant pleaded the general issue, and, at the trial, the

jury found a verdict for the plaintiff with damages under forty shillings.

THE judge not having certified pursuant to the 22 and 23 *Car.* 2. it was determined that the plaintiff was entitled to no more costs than damages, because, upon this record, the defendant might have given *liberum tenementum* in evidence, and shewn that this was his own house; and consequently the title might have come in question.

IN an action for mesne profits by the nominal plaintiff in ejectment, there was a verdict for the plaintiff with one shilling damages.

Page 66, &c. Trespass, for mesne profits.

Doe v. Davis B. R. H. 36 G. 3. S. C. 6 T. R. 592.

UPON which, the master having allowed only one shilling costs, *Wigley* moved that the master might be directed to review his taxation, and to tax the plaintiff his full costs; and that the lessor of the plaintiff might be at liberty to take out execution for them. He contended that this case did not fall within the meaning of the statute of 22 and 23 *Car.* 2. inasmuch as the trespass being laid on a day subsequent to the day of the demise in the ejectment, the title could not come in question, the defendant being precluded by the judgment in ejectment from controverting it (1). If the action had been brought in the name of the lessor of the plaintiff, and the trespass laid upon a day anterior to that of the demise, the title might then have come in question, and, consequently, a certificate

Page 40.

(1) Vide Aslin v. Parkin, 2 Burr. 668. Barnes, 472.

Page 71. from the judge would, in such case, have been requisite. He cited Lord *Dacre* v. *Tebb*, 2 *Bl.* 1151.

THE Court were of opinion, that there might have been a certificate from the judge under the statute of *Car.* 2. and, therefore, discharged the rule.

Page 89. Trespass. IF, in an action of trespass *quare clausum fregit*, a special plea of justification, pleaded to the whole declaration, be found for the plaintiff, he shall have full costs, however small the damages may be, notwithstanding the judge shall not have certified that the title was in question.

Redridge v. Palmer C. B. M. 32 G. 3. 2 H. Bl. 2. As where in trespass, the declaration, which contained only one count, stated that the defendant with force and arms broke and entered a certain close of the plaintiff, called the yard, situate, &c. and then and there broke down, prostrated, &c. two wooden fences, &c. and the materials thereof, to wit, five hundred pales, &c. took and carried away, &c. and also then and there pulled down, spoiled, and destroyed a certain hog-sty, &c. and the materials thereof, to wit, fifty cartloads of wood, &c. took and carried away, &c. and then and there ejected, expelled, and put out the plaintiff from the possession, &c. of his said close, &c.

THE defendant pleaded, 1st, not guilty; and 2dly, a licence to all the trespasses mentioned in the declaration. At the trial a verdict was found, upon each of these pleas, for the plaintiff, with one shilling damages, and forty shillings costs. The judge

did not certify. The prothonotary having allowed full costs to the plaintiff, a rule was obtained for re-viewing his taxation.

UPON shewing cause against this rule, it was insisted, (*inter alia*) that it was the constant practice, never departed from by the officers of the Court, to tax full costs for the plaintiff, wherever a special plea of justification was pleaded, and found against the defendant.

ON a subsequent day, Lord LOUGHBOROUH, *Chief Justice*, declared, that after due consideration, the Court were of opinion, that whatever question might be made on the true construction of the statute, as to the *asportavit* of personal chattels, yet as the practice had been uniform for a great length of time, above an hundred years, it would be highly inconvenient to disturb it. The rule, therefore, which had so long prevailed in both this Court and the King's Bench, namely, that where there was a special plea of justification found against the defendant, the plaintiff was entitled to his full costs, ought not to be overturned.

Rule discharged.

IN a still later case, which was trespass *quare clausum fregit*, there were several pleas. 1. The general issue. 2. Disclaimer of title, that the trespasses were involuntary, and tender of amends. 3. A distress taken damage feasant, for the same trespass. 4. That the cattle escaped on account of the fences being out of repair. 5. A licence. To all the special pleas, except that of the licence, there were new assignments, and

Comer v. Baker C.B. T. 34 G. 3. 2 H. Bl. 341.

to the new assignments similar pleas, and issues taken on them, on which a general verdict was found for the plaintiff with five shillings damages; but the judge did not certify. Full costs having been allowed the plaintiff, a rule was granted to shew cause why the prothonotary should not re-view his taxation.

In support of this rule it was said that the report of the prothonotaries in *Redridge* v. *Palmer*, as to the practice in the office, proceeded on a mistake in not distinguishing between such pleas as might bring the title to the freehold in question, and such as could not. In the present case, the title to the freehold could not come in question, on any of the pleas pleaded: and it was not a mere special plea, that would entitle the plaintiff to full costs without a certificate. No such arbitrary rule was ever laid down prior to the case of *Redridge* v. *Palmer*. The case of *Page* v. *Creed* (a), 3 *Term Rep.* 391, shews that a mere special plea found against the defendant, would not entitle the plaintiff to full costs, without a certificate; but that such a plea as would have that operation, must in effect be tantamount to a certificate. The same doctrine was also laid down in *Washer* v. *Smith* (b), 2 Barnard, B. R. 180, 277, and in *Dover* v. *Robinson* (c), Barnes, 128. To the same effect, likewise, was *Cockerill* v. *Allanson* (d). T. 22 G. 3. B. R.

(a) Page 63.
(b) Page 63.
(c) Page 39.
(d) Page 86.

The Court said, that if this had been a new case, they should have thought that the construction of the statute, 21 and 23 *Car.* 2. *c.* 9. contended for on the part of the defendant, ought to be adopted. But that as a different practice had

long prevailed, and as that practice was confirmed by the case of *Redridge* v. *Palmer*, which was decided on great consideration, they did not think it right to depart from it.

Rule discharged.

Page 102, &c. Wilful and malicious trespass.

If it appear at the trial, that the trespass, however trifling, was committed *after notice*, and the jury give less than forty shillings damages, the judge is bound, under the 8 and 9 *Wil.* 3. c. 11. s. 4. to certify that the trespass was wilful and malicious, in order to entitle the plaintiff to full costs.

Reynold v. Edwards. B.R.M. 35 G. 3. M. S. S. C. 6. T. R. 11. S. P. Swinnerton.

v. Jervis, C. B. P. 22 G. 3. cit. ib. Vid. 5 T. R. 723.

CHAP. I.

SECT. IV.

Of Costs, where a Defendant in any Action, or a Plaintiff in Replevin, hath leave to plead several Matters.

Page 114.

In replevin, the declaration contained two counts, the one for taking sheep at the parish of *Mildenhall*, in a place called *Undley Common*: the other, for taking them at the parish of *Lakenheath*, in a place called *Undley Common*. To the first count *non cepit* was pleaded, on which issue was joined, and found for the defendant. To the second, avowry for damage

Brooke v. Willet. C.B.H. 35 G. 3. 2 H. Bl. 435.

feasant, to the defendant's right of common for all commonable cattle, except sheep.

Pleas in bar, 1. A prescription for common, for twenty sheep, on the *locus in quo*, viz. *Undley Common*, on which issue was joined and found for the plaintiff. 2. Common by cause of vicinage, on which the issue was found for the defendant; and the judge did not certify that the plaintiff had probable cause for pleading such matter, under 4 *Anne*, *c.* 16. s. 5. (*a*). And now a rule being granted to shew cause, why the prothonotary should not tax the defendant the costs of those issues which were found for him, and why they should not be deducted from the costs of that issue which was found for the plaintiff; and also from the general costs of the cause to which the plaintiff was entitled, by having one issue found in his favour, by which it appeared that he had a cause of action.

(*a*) Page 105.

After time taken to consider, the Court declared that it appeared upon inquiry to be by no means the settled practice of the Court of King's Bench to confine the statute of 4 *Anne*. *c.* 16. to the costs of the pleadings, in all cases, and that both on the words and spirit of the statute, and on principles of justice, the defendant was entitled to have the costs allowed of the trial of the issue which was found for him, and not of the pleadings alone. The rule was therefore made absolute.

CHAP. II.

SECT. III.

Of Costs where there are several Defendants, and one or more of them acquitted by Verdict.

In assault and battery against two defendants, one of them pleaded not guilty, and the other let judgment go by default. A verdict having been found at the trial for the defendant who pleaded, and one shilling damages assessed against the other defendant, the Court, upon an affidavit that the defendants had agreed to consolidate the costs, allowed the plaintiff to set off the costs which he was to receive from the defendant who had suffered judgment by default, against those he was to pay to the other defendant, who had obtained a verdict.

Page 146.

Cawthorn v. Thompson & ano. B. R. M. 25 G. 3.

SECT. V.

Of the Costs of a Defendant, where he is impleaded in a Superior Court, for a matter within the jurisdiction of a Court of Conscience, or Requests.

To an action for goods sold and delivered the defendant pleaded that, at the time of commencing the action, he was not indebted to the plaintiff to the amount of forty shillings, and that he was liable to be summoned for such debt to the Court of Requests, established by the statute 22 *Geo.* 2. *c.* 47. within the Borough of Southwark, &c.

Page 156, &c. Southwark Court of Requests.

Barney v. Tubb, C.B.M. 35G.3. 2 H. Bl. 351.

To this plea there was a general demurrer.—The ground of which was, that though the matter of the plea, if used by way of suggestion upon the record after verdict, would have been good to deprive the plaintiff of costs, and to give them to the defendant, yet the 22 *G.* 2. *c.* 47. did not authorize it to be pleaded in bar to the action.

THE Court were clearly of that opinion, and gave judgment for the plaintiff.

THE plaintiff having thus obtained judgment, on the fifth day of July in *Trinity Term* executed his writ of inquiry, the damages being assessed at one pound one shilling and three pence, and entered up final judgment on the 9th, the last day of that Term. On the 4th day of this Term, a rule was obtained to shew cause why the prothonotary should not re-view his taxation of costs, and why the proceedings on the judgment should not be staid, upon an affidavit which set forth the proceedings as above stated, and added, that the defendant, at the time of the commencement of the action, *resided* within the jurisdiction of the *Southwark* Court of Requests.

BULLER, *Justice*.—I think it clear that an application *for leave to enter a suggestion* on the record, is the proper mode of proceeding in this case. Without such a suggestion, the judgment would not be warranted by the premises. I think, also, that the application ought to have been made to the Court, before judgment was finally given, and therefore that it should have been made in the last term: and I hold, that even if the

writ of inquiry be executed on the last day of the term, the plaintiff has a right to sign his judgment as of that term. But here the defendant had from the fifth to the ninth of July, to apply to the Court, and having neglected so to do, he is now too late. I agree, that the affidavit ought to contain all the facts necessary to bring the case within the act; for if we are to grant leave to enter the suggestion, it must be upon such a state of facts as will warrant us in so doing. Here a material allegation is wanting, namely, that the defendant was liable to be *warned* to the Court of Requests for *Southwark*, which would alone have been a sufficient objection to this application, even if it had been right in all other respects.

HEATH and ROOKE, *Justices*,—of the same opinion.

Rule discharged.

Page 156, &c. *Welch* judicature act.

Evans, Gent. one, &c. v. Jones. B.R.M. 36 G. 3. 6 T. R. 500.

THIS was an action on the case for words spoken by the defendant in *Wales* (where he resided) of the plaintiff who was an *attorney* of this Court. The plaintiff sued by attachment of privilege; but laying the venue in the *Welch* county, the cause was tried before Lord *Kenyon* at *Hereford*, and the plaintiff had a verdict for five shillings damages; whereupon the judge certified under the *Welch* judicature act, 13 *Geo.* 3. *c.* 51. that the defendant was resident within the dominion of *Wales*, at the time of the service of the attachment of privilege in this action.

IT was now moved to enter this fact on the record, pursuant

to the statute, in order that a judgment of nonsuit might be entered against the plaintiff, to entitle the defendant to costs.

Lord Kenyon, *Ch. Just.*—The plaintiff might have exercised his privilege by laying the venue in *Middlesex*; but as he has laid it where the cause of action arose, and where the defendant resided, I am clearly of opinion that he is within the *Welch* judicature act, and that the suggestion must be entered on the record.

Rule absolute.

Page 164. Court of Requests.

Jonas v. Greening. B.R.H.34 G.3. 5 T. R. 529.

The statutes 3 *Jac.* 1. *c.* 15. and 14 *Geo.* 2. *c.* 10. establishing a Court of Requests in the city of *London*, do not apply to cases where less than forty shillings damages are recovered in a special action upon the case, for the breach of an agreement; but only to cases where a certain debt or sum is due to the plaintiff. Therefore, where the plaintiff, in a special action on the case for not delivering a certain quantity of lemons, according to an agreement, recovered a verdict for only eighteen shillings and three pence, the Court refused to permit the defendant to enter a suggestion on the roll, that the cause of action arose in *London*, and that he was liable to be summoned to the Court of Requests there.

Brooks v. Moravia. C.B.M 34 G.3. 2 H. Bl. 220. S. P. Webb v. Brown. B.R H 34 G.3. 5 T. R. 535. D acc. 4 T. R. 530.

And those statutes extend only to cases where the *plaintiff*, as well as the defendant, resides within the jurisdiction of the Court of Requests. For it is obvious from the words and general scope of the act of 14 *Geo.* 2. that it was only intended to extend to persons residing within such jurisdiction; and

that the word *inhabiting* must be taken to apply as well to citizens and freemen, as to every other person there described. If this were otherwise, there might be a failure of justice in many cases; as if that Court should adjudge a plaintiff's demand to be unfounded, they could not, were he resident out of their jurisdiction, enforce payment of costs to the defendant.

CHAP. III.

SECT. I.

Of Costs where a Person sues, or defends, as an Executor or Administrator.

AN executor, suing as such, for money received by the defendant *after* the testator's death, to the plaintiff's use, is liable to costs upon a verdict for the defendant.

Page 180, &c. Executor.

As where the plaintiff's wife was executrix to *Wood*, her former husband; and this action for money had and received was brought against the defendant to recover back money received by him after *Wood*'s death, to the use of plaintiff's wife, as executrix. The count charged the defendant with the receipt of this money to the use of the plaintiff's wife, as executrix, before she married *Goldthwayte*; and another since. After verdict for the defendant, a rule was obtained calling on

Goldthwayte and Wife, Executrix, v. Petrie. B.R.P.33 G.3. 5 T. R. 234.

the plaintiffs to shew cause why the master should not be directed to tax the defendant his costs.

After taking time to consider the question, Lord Kenyon, *Ch. Just.*—now delivered the opinion of the Court. In general, it is an established rule that where an action is brought by an executor, as executor, for transactions arising in the life time of the testator, he is not liable to pay costs though he fail in the action. But in this case it was not necessary to name the wife as executrix; she might have brought the action in her own right; for it is stated in both the counts, that the money was received, and the promises made, by the defendant after the testator's death. We have looked into the authorities, which we find have settled this point; and which decide that the plaintiffs in this case are liable to pay costs.

Page 180. One of them is the case of *Jenkins* v. *Plombe*, reported in 6 *Mod.* 91. 181. and *Salk.* 207. It is true that in *Salk.* 314. there is another case of *Eaves* v. *Mocato*, which, as it is there reported, appears to be a determination the other way: but in *Jenkins* v. *Plombe* in *Salk.* 207. Lord *Holt* takes notice of *Eaves* v. *Mocato*, and shews that the report of it in the subsequent page (314) is inaccurate. Upon the authority, therefore, of this and other cases, we are of opinion that the defendant is entitled to costs.

Rule absolute.

Page 189. An executor, plaintiff, does not pay costs, upon a judgment as in case of a nonsuit, under the 14 *Geo.* 2. *c.* 17.

Booth v. Holt, C.B.H. 34 G. 3. 2 H. Bl. 277.

SECT. III.

Of Costs where a Plaintiff sues in Formâ Pauperis.

A PLAINTIFF, suing in *formâ pauperis*, is not entitled to receive the issue money; therefore, where such a plaintiff had signed judgment on account of the defendant's not paying it, the Court set aside the judgment for irregularity (1).

Page 220.

Codron v. Hayman. H 34 G 3 B.R. 5 T. R. 509.

CHAP. IV.

SECT. VI.

Of Costs in Prohibition.

IF at the trial of a suit in prohibition, the jury find a *different modus*, from that laid in the declaration, the verdict must be entered specially for the defendant, and he is entitled to his costs. But, in such a case, no consultation can be awarded; for though the modus be not found as laid, yet, if *any* modus be found, that is a sufficient reason to warrant the prohibition.

Page 312, 321.

Brock v. Richardson. B.R.M. 27 G. 3. M.S.S.C. 1 T.R. 427.

SECT. VIII.

Feigned Issues.

IF two issues are directed to be tried by the Court of Chancery, and the material issue be found for the party, who sets

Page 343.

Blackburn v. Gregson.

(1) But now in *no case* can judgment be signed for non-payment of the issue money. Reg. Hil. B. R. 35 G. 3. 6 T. R. 218. Ibid 477. Reg. Hil. C. B. 35 G. 3.

In. Chanc. H. 25 G. 3. 1 Br. Ch. Rep. 425.

the cause down for further directions, he must have the costs at law.

CHAP. VI.

SECT. I.

New Trial.

Page 395, 397.

Smith v. Hall. B.R.M. 35 G. 3. M.S.S.C.6T.R. 71.

A SPECIAL case, reserved at *nisi prius*, for the opinion of the Court, turning out to be defectively stated, the cause was sent down to a second trial, but the Court gave no directions concerning the costs. The defendant obtained a verdict on the last trial, and now moved that the master might be directed to allow him the costs of the first trial, as well as those of the second, the latter of which the master had only allowed upon the taxation of costs.

BUT, upon the master's reporting that the practice of this Court had, in cases of this sort, been uniform, for some time past, not to allow the costs of the first trial, unless the rule for the second contained express provision for them, the Court refused the motion.

Lickbarrow v. Mason. B.R.M. 35 G. 3. M.S.S.C.6T.R. 131.

So where a *venire facias de novo* is awarded, the party ultimately prevailing is not entitled to the costs of both trials, but merely to those of the second.

Booth v. Atherton.

BUT, in another case, there was a verdict, at the trial, for the plaintiff, subject to the opinion of the Court, upon a case

reserved. This case upon argument the Court judged to be imperfectly stated, and, therefore, they sent the cause down to a second trial, but the rule for so doing was silent as to the costs. The defendant, however, did not think proper to go down to another trial, but, upon advice, withdrew his plea, and gave the plaintiff judgment by *cognovit actionem*. B.R.H. 35 G. 3. M.S. S.C. 6 T.R. 144.

THE master not having allowed the plaintiff the costs of the trial, a rule was obtained to shew cause, why he should not be directed to review his taxation, and allow those costs.

AGAINST this rule, it was insisted, that this case fell within the reason and principle of those of *Mason* v. *Skurray*, and *Hankey* v. *Smith*. And it was compared to the case where the parties actually go to a second trial, when clearly the costs of the first trial would not have been allowed. Page 395, 397.

BUT the Court were of opinion that the plaintiff was entitled to the costs of the trial, and added, that their so deciding would not break in upon any of the cases alluded to.

Rule absolute.

SECT. II.

Judgment as in the Case of a Nonsuit.

A RULE was granted to shew cause why there should not be judgment as in case of a nonsuit, the plaintiff not having proceeded to trial in due time after issue joined. The affidavit on which the motion was grounded, stated also that the plaintiff Page 403, &c.

Jordaine v. Sharpe, C B.H. 34 G. 3. 2 H. Bl. 280.

had given notice of trial, and had not countermanded it, but had entered the cause for trial, and withdrew the record after it was called on, by which the defendant had been put to the expence of witnesses, briefs, &c. Sufficient cause being shewn, the Court discharged the rule, on a peremptory undertaking of the plaintiff to try the cause at the next sittings, and on payment of the defendant's costs, on account of the cause not being tried. This latter part of the rule was opposed on the part of the plaintiff, and it was insisted that by the practice of this Court, the plaintiff could not have a rule for costs for not going on to trial, and a rule for judgment as in the case of a nonsuit, at the same time. But, on consulting the prothonotary, who said that he had often taxed costs in similar circumstances, the rule was discharged as abovementioned.

SECT. V.

Arbitration.

Page 418.

Addison v. Gray. C.B.H. 6 G. 3. 2 Wils. 293. Fox v. Smith, C.B.M. 6 G. 3. Ibid 267.

It should seem, where an award directs, generally, the payment of all costs and charges due on account of an action depending in an *inferior* court, that such part of the award is void by reason of uncertainty, there being, in such case, no proper officer to ascertain the amount of the costs to be paid by a taxation.

Page 428.

Burchall v. Ballamy, B.R.H. 11 G. 3. 5 Burr. 2693.

If a cause go off at *nisi prius* upon a reference to arbitrators, who in fact never make an award, in consequence of which the cause goes down a second time for trial, the party finally prevailing is entitled to the costs of going down to trial at the

former assizes, in the same manner as if the cause had been then made a *remanet*.

GENERALLY, where a party applies to set aside an award, and fails in the application, he shall pay costs. For when parties urge groundless objections against judges of their own choosing, it is but just that they should be subjected to the costs of the other side. Anon. B.R.M. 35G.3.

CHAP. VIII.

SECT. I.

Security for Costs.

WHERE there are two defendants, and only one of them puts in bail, that one has a right to call upon the plaintiff, a foreigner and resident abroad, to give security for the costs, without putting in bail for the other defendant: for, by putting in bail for himself, that defendant has indemnified the plaintiff by securing to him the debt and costs in case he recovers, and is, therefore, entitled to equal security from the plaintiff for his costs, in case the plaintiff fail in the action. Page 443. Carr v. Shaw and Price, B.R.M. 36 G.3. 6 T. R. 496.

IN *Ganesford* v. *Levy*, the Court of Common Pleas laid it down as a settled point to guide the practice in future, that the mere circumstance of a plaintiff's *residence in a foreign country*, C.B.M. 33 G.3. 2 H. Bl. 118.

and so out of the reach of the process of the Court, renders him liable to be called upon to give security for costs.

But that Court in a subsequent case, under the following circumstances, refused to compel the plaintiff to give security for costs.

Henschen v. Garves, C.B.M.35 G.3. 2 H. Bl. 383.

The plaintiff was a foreign seaman, and brought this action for wages against the defendant, who was a foreign owner of a *Swedish* vessel. A rule was granted to shew cause, why the proceedings should not be staid, till the plaintiff gave security for costs, on an affidavit which stated, "that the abovenamed "plaintiff is a foreigner, and as deponent hath heard and be- "lieves, does not reside in this kingdom, but at this time is "in a ship or vessel on a voyage up the Baltic sea. And "deponent further saith, that he believes the said plaintiff "hath not any goods or chattels, lands or tenements within this "kingdom."

Upon shewing cause it was stated, that it was an *English* ship on board of which the plaintiff was, and that he was under articles to return to *England*.

The Court held (contrary to the opinion of Rooke, *Justice*,) that it would be highly impolitic in the present state of public affairs, when men were wanted in the navy, to throw difficulties in the way of a foreign sailor recovering his wages in our Courts, who was serving on board an *English* ship, and

who, if he were compelled to give security, would probably not be able to recover them at all.

Rule discharged.

THE Court of King's Bench made a rule requiring the plaintiff, who was a bankrupt and had left the kingdom, to give security for the costs, after the cause was at issue, and the plaintiff had given notice of trial for the sittings after Term.

Barker v. Hargreaves, B.R.H.36 G.3. 6 T.R. 597.

SECT. II.

Of staying a Second Action till the Costs of a former are paid.

IF the *defendant* in a former ejectment, in which he was evicted, bring another ejectment for the recovery of the same premises, the Court will now (*a*) stay the proceedings till the costs of the former action have been paid; for it is immaterial for the purpose of this rule respecting the costs, whether the lessor of the plaintiff in the second action were the plaintiff or the defendant before.

Page 453.

Thrustout ex. Dim. Williams v. Holdfast, B.R.P. 35G.3. 6 T.R. 223.

(*a*) Contrary to Roberts v. Cook, 4 Mod. 379.

SECT. III.

Deducting the Costs of one Action from those of another.

IN an action brought by one of the attornies of the Court of the Lord Mayor of *London*, for the recovery of certain costs directed to be paid to the plaintiff by a *rule* or *order* of that Court, made in the course of certain proceedings depending therein, a verdict was found for the plaintiff, on a count,

Page 474.

Emerson, one, &c. v. Lashley, C.B.M.34 G.3. 2 H. Bl. 253.

stating all the facts, subject to the opinion of the Court of Common Pleas, on the question, whether the action could be maintained. The Court, after argument, having given judgment for the defendant, a rule was granted to shew cause, why the costs awarded by the plaintiff in the Mayor's Court, should not be deducted from the costs to be allowed to the defendant in the present action, and why the prothonotary should not make his *allocatur* after the deduction.

THE Court, without hesitation, said, it was highly reasonable to allow the deduction, and therefore made the rule absolute.

CHAP. X.

SECT. II.

Of taxing an Attorney's Bill, &c.

Page 499, &c. *Action for Bill.*

AN attorney cannot support an action for a bill for business, though done *at the Quarter Sessions*, without having previously *delivered* it *signed* to his client. For as it is now the practice of the Court to tax (*a*) such bills for business done altogether at the sessions, there is no reason for restraining the general words of the first part of the clause, [of 2 *G.* 2. *c.* 23. *s.* 23.] which requires an attorney to deliver his bill one month before he commences any action for the recovery of the amount.

Clarke v. Donovan, B.R.T. 34 G. 3. 5 T. R. 694.

(*a*) Page 507.

Page 509, &c. *Costs of Taxation.*

THE bill of the plaintiff, an attorney, had been referred to the prothonotary by a judge's order, and on the taxation thereof,

more than a sixth part was taken off. But the deduction was caused, not from any overcharges of particular *items*, but from the whole of the expences of defending two actions for one *Brandon*, being disallowed; which it was stated that the defendant had undertaken to pay to the plaintiff, but which the prothonotary on reading the affidavits, was of opinion that he had not undertaken to do. A motion being now made that the plaintiff should pay the costs of the taxation of his bill, according to the statute, 2 *G.* 2. *c.* 23. s. 23.—

White, one, &c. v. Milner, C.B.M. 34 G. 3. 2 H. Bl. 357.

The Court held, that that statute was applicable only where an attorney made exorbitant charges on his client, in the particulars of his bill, and the foundation of his demand was not denied, but only the amount of it. In the present case, the plaintiff's charges for defending *Brandon* were not objectionable, provided he could have proved that the defendant was liable to pay them, and the other *items* of the bill were not reduced one sixth.

The plaintiff recovered a verdict for two hundred pounds against the defendant in an action of trespass for taking his goods, and the defendant had previously obtained judgment against the plaintiff on a bond for two thousand pounds, who was surrendered in execution of that judgment. And now on the motion of *Bond*, Serj. a rule was granted to shew cause, why it should not be referred to the prothonotary to take an account of the damages recovered on the verdict obtained by the plaintiff, and tax his costs thereon, and why the defendant should not be discharged from the payment of such damages

Page 471, 517, 518.

Vaughan v. Davies, C.B. H. 35 G. 3. 2 H. Bl. 440.

and costs, when so ascertained and taxed, upon his entering satisfaction for the amount thereof on the judgment recovered by him, in part discharge of that judgment. 2 *Black.* 826. *Thrustout* v. *Craster.* 1 *H. Bl.* 23. *Schoole* v. *Noble*, 217. *Nunez* v. *Modigliani*, 657. *O'Connor* v. *Murphy.*

Adair, Serj. shewed cause, on the part of the attorney for the plaintiff, on affidavits, stating that he had no fund to resort to but the sum recovered by the plaintiff for the payment of his bill, the plaintiff himself being insolvent—the set-off, therefore, ought not to be allowed, till the attorney's bill was satisfied. He said, that the Court would protect an attorney who was their officer, who would otherwise be without remedy, and that in the Court of King's Bench the equitable right of setting off the sum recovered in one action against that recovered in another, was always subject to the attorney's lien for his bill, for which he cited *Mitchell* v. *Oldfield*, 4 T. R. 123, and *Morland* v. *Lashley*, B. R. T. 34 *G.* 3.

But, after consideration, the Court said that the attorney's lien did not extend to prevent the parties in the cause from having the benefit of the set-off which was applied for in this case, and therefore made the rule absolute.

And Buller, *Justice*, mentioned, that a similar decision had taken place this Term in the Court of *Chancery*, in a case of *Barton* v. *Etherington.*

Page 518.

Randle v. Fuller.

A rule was obtained to shew cause why the master should not, upon the taxation of the costs in this cause, set off the

sum of thirty-seven pounds three shillings and sixpence against such costs as should, upon taxation, be found due from the defendant to the plaintiff, and if more should be found due to the plaintiff than that sum, why, upon payment of the balance, execution should not be stayed. This was founded upon an affidavit, stating, that the abovementioned sum was due from the plaintiff to the defendant upon a judgment in a former action; and that the plaintiff had already received part of his debt under an execution.

B. R. M. 36 G. 3. 6 T. R. 456. Morland v. Lashley, B.R.T. 35 G.3. S. P.

Cause was shewn upon an affidavit of the plaintiff's attorney, claiming a lien upon the costs and damages recovered in the present action, and requiring to have such lien, which amounted to more than the sum demanded by the defendant to be set off, satisfied in the first instance; and stating further, that the plaintiff had absconded, and that the attorney had no other security for his bill than the costs and damages recovered. In support of the rule, it was said, that the principle had been laid down in the Common Pleas to be, that the attorney had only a lien subject to the equitable claim against his client (*a*).

(*a*) Vid. Schoole v. Noble, Page 517.

The Court desired the matter to stand over for further inquiry; and on a subsequent day,

Lord Kenyon, *Ch. Just.* said—It had been expressly determined in *Mitchell* v. *Oldfield* (*b*), that the attorney had a general lien on the costs and damages recovered, without any such restriction as was now attempted to be put upon it; and that upon the reason and justice of the case he could find no ground

(*b*) Page 518.

to impose such a restriction. That whatever might be the practice in the Court of Common Pleas, he was glad to find that his opinion was warranted by the settled practice of this Court.

Rule discharged.

Page 520. Payment after Notice.

Read v. Dupper, B.R.T.35 G.3. 6 T. R. 361. S. P. Lee v. Hall. B R.H.35 G.3. M. S.

If the attorney of the defendant pay to the plaintiff in the cause the debt and costs recovered, *after notice* from the plaintiff's attorney not to do so, because his bill was unsatisfied, he will be liable to pay over again to the plaintiff's attorney the amount of his lien on such debt and costs of suit. The governing principle in such cases has been long settled, namely, that the party shall not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and in many instances at whose expence, those fruits are obtained. If, indeed, the money has been paid over *bona fide* to the plaintiff before notice from his attorney of his lien, such payment would have been good; but where the payment is made in violation of such a notice, it cannot be suffered. In *Welch* v. *Hole*, Lord *Mansfield* compared this to the case of an assignment of a chose in action, which indeed in legal strictness cannot be done; but still, according to the rules of equity and honest dealing, if the assignee give notice to the debtor of such assignment, he shall not afterwards be suffered to avail himself of a payment to the principal in fraud of such notice.

Page 519.

CHAP. XI.

SECT. I.

Costs upon an Indictment.

IF the defendants in an indictment for not repairing a road, (which indictment has been removed into B. R. by *certiorari*) be acquitted at the assizes for want of prosecution, they must apply to the judge *at nisi prius* for their costs, on the ground of its being a vexatious prosecution. For if they omit to do so, the Court of King's Bench cannot afterwards relieve them on motion, having no authority to award costs under the 13 *Geo.* 3. *c.* 78. s. 64.—that statute only giving the Court "before whom the indictment is tried" such a power.

Page 525.

Indictment for not repairing a Road.

The King v. the Inhabitants of Chadderton, P. 33 G. 3. 5 T. R. 272.

AND if the judge, on the trial of an indictment for not repairing a road, certify, upon the back of the record, that the defence was frivolous, without also expressly awarding costs under the 13 *Geo.* 3. *c.* 78. s. 64, the prosecutor shall have costs, for as that statute requires no precise form of words to be used, such a certificate is, in effect, an awarding of the costs.

The King v. the Inhabitants of Clifton, T. 35 G. 3. 6 T. R. 344.

A JUSTICE of the peace, who indicts a road for being out of repair (the indictment being afterwards removed by *certiorari* into B. R.) is, in case the defendant should be convicted, entitled to costs, by the 5 and 6 *W.* & *M. c.* 11. s. 3 (*a*), the words of which are "that costs shall be given to the prosecutor, if

Page 536.

The King v. Kettleworth, B. R. M 33 G. 3. 5 T R. 33.

(*a*) Page 527.

" he be the party grieved, or be a justice of the peace, &c. " who shall prosecute upon the account of any fact committed " or done, that *concerned* him or them as an *officer* or *officers*, to " *prosecute* or *present*, &c. It is true, that this act might have been done by any individual, as well as by a magistrate, but still he did it in the regular discharge of his duty. Magistrates are to see that the public roads are kept in repair, and it is their duty to present or indict them; and there is no difference, on the subject of costs, between a presentment and an indictment.

5 T. R. 34.

SECT. VI.

Information in Nature of a Quo Warranto.

Page 585, 6.

The King v. Wallis, M. 34 G. 3. 5 T. R. 375.

THE prosecutor of an information in the nature of a *quo warranto* against a person, as constable of *Birmingham*, is not upon a verdict against the defendant, entitled to costs under the 9 (*a*) *Ann. c.* 20. s. 5.—That statute does not extend to *quo warranto* informations for the usurpations of any offices, not in corporations.

(*a*) Page 580

CHAP. XIII.

Page 135.

Costs upon an interlocutory Order in an inferior Court.

AN *action* cannot be maintained to recover costs taxed upon, and directed to be paid by an *interlocutory order*, made in the course of a suit in an inferior Court, notwithstanding

the defendant should be resident out of the jurisdiction of such Court, and so beyond the reach of any attachment from it.

Emerson, one, &c. v. Lashley, C.B. M. 34 G. 3. 2 H. Bl. 248.

THUS where in *assumpsit*, the first count of the declaration stated, that in a certain action and attachment thereunto made, which had been depending in the Mayor's Court of *London*, the plaintiff was the attorney of the defendant; that whilst the said action was so depending, a certain *rule or order* was made for the now plaintiff (*Emerson*) to shew cause why he had refused to proceed in the said action for the said now defendant: and such proceedings were thereupon had, that afterwards, &c. a certain *other rule or order* was made, whereby it was ordered that the said *first mentionend rule* should be *discharged with costs*, to be taxed by the proper officer. There was then an averment that the costs were so taxed at, &c. of all which premises the defendant had notice; whereby and according to the form and effect of the said last mentioned rule or order, he became liable to pay to the plaintiff the said sum of, &c. and being so liable, the defendant in consideration thereof afterwards, &c. promised to pay, &c. There were also the common counts.

THE defendant pleaded *non assumpsit* to the whole declaration, and, at the trial, a verdict was found for the plaintiff on the first count, subject to the opinion of the Court, on the question whether the action could be maintained. It appeared, upon the trial, that the defendant, at the time of entering the action and attachment in the Mayor's Court, and also at the time when the present action was brought, was resident out of the jurisdiction of that Court.

Lord *Chief Justice* Eyre.—If there were nothing else in this case, but the mere circumstance of its being an action brought for the first time, the Court would think again and again, before they give it any encouragement. In general, there is another remedy, (however that remedy may fail in an inferior Court, whose jurisdiction is local,) and the consequence of our determining that an action would lie for such costs as these, would be, that instead of applications to the Court for their superior interference, numberless actions would be brought, of which we have enough already. And upon general principles of law, it seems pretty clear, that no action can lie for such costs. In actions brought in superior Courts, the costs become a duty only by being united with the debt in the judgment: there is that sort of credit given to the judgments of a Court of competent jurisdiction, that they create debts and duties upon which actions of debt are founded. General policy and convenience require, that faith should be given to those judgments, and that duties should arise; but as to the conduct, and all the steps belonging to the conduct of the interlocutory proceedings, they are fit to be regulated by the authority of the Court where they arise, but by no means fit to be the foundation of general duties creating moral obligations. It is the power of the court that enforces these kind of orders, and the power of the Court will always be regulated by the discretion of the Court in causes which come before them. I was very much struck with the observation, that if we suffer an action to be brought for costs, thus ordered to be paid in an inferior Court, we must take that order to be final: we give credit, indeed, to the judgments of inferior Courts,

because there is a regular course, if those judgments are improper, by which they may be corrected; but the case is very different with respect to these interlocutory orders, from which there is no appeal or writ of error. It would be impossible to take one of these interlocutory proceedings as final, and if we were to inquire whether the inferior Court had done right, what a new field would be open for investigation! If a superior Court were to take into consideration a cause with which they had nothing to do, and to give judgment whether the inferior Court had done right in making an interlocutory order, it would be impossible for any such Court to go on with its ordinary business. The case that comes the nearest to the support of this action, is that of *The King* v. *Chamberlayne* (*a*), where the Court of King's Bench decided, that the costs upon a recognizance to prosecute were in the nature of a debt, which an administrator might claim. But the expressions in that case must be understood according to the subject matter; properly speaking, those costs were not a debt to any one, for, if they were a debt, there was no occasion for any recognizance to enforce the payment of them; the Court indeed held, that the original right devolved from the original party to the administrator, but if it were not a debt to the original party, it was not a debt to his representative: the recognizance, indeed, was merely a security, without which the costs could not have been recovered at all. That case, therefore, rather makes against the argument to which it is applied. Upon the whole, therefore, although there will be a particular inconvenience arising in this case, from the circumstance of the defendant being out of the jurisdiction of the inferior Court, it is better

(*a*) Page 544.

to oblige the other party to wait till he can be brought within that jurisdiction, than to produce the mischievous consequences which would ensue from our determining that this action could be maintained.

GOULD, *Justice.*—I agree with my Lord, according to the rule laid down by *Littleton* and Lord *Coke*, that it is better to submit to a particular inconvenience, than introduce a general mischief. It is apparent, what an ill use might be made of our establishing a precedent of this kind. Did any man ever hear of an action in a superior Court to recover costs, where there had been an interlocutory reference to a prothonotary or master? It has been always holden, that an attachment was the proper remedy on the *allocatur*.

HEATH, *Justice.*—I am of the same opinion. The question arises upon an action for costs, given by an interlocutory order, which are not costs given by the statute of *Gloucester*. It is a motion in an inferior Court, by a party against his own attorney; the Court acting upon a power it has over its own ministers, declares the complaint groundless, and inflicts a penalty. As, therefore, these costs are a penalty, and not given by the statute of *Gloucester*, I am of opinion that the action will not lie.

ROOKE, *Justice.*—I am of the same opinion. I think it would be very dangerous to encourage actions of this sort.

Judgment for the defendant.

Page 606. Bail.

Perigal v. Mellish, B.R.T. 33 G.3. 5 T. R. 363. Vid. 6 T. R. 284.

BAIL ought to surrender their principal immediately upon the return of the *capias ad satisfaciendum*; if they do not, a cause of action accrues against them; and if, therefore, after the return of *non est inventus* to a *capias ad satisfaciendum*, the plaintiff proceed against the bail, and deliver a declaration conditionally, in an action upon their recognizance, the Court will not stay the proceedings but on payment of the costs of the second action against the bail, as well as the debt and costs in the original action, although the bail tendered the original debt and costs before the end of eight days from the return of the *capias ad satisfaciendum*, within which time by the practice of the Court, the bail might have discharged themselves by surrendering their principal.

Page 607. Bail, Costs in Error.

Yates v. Doughan, B.R.P. 35 G.3. 6 T. R. 288.

IN conformity to the cases of *Penruddock* v. *Errington*, *Cro. Eliz.* 587. *Smith* v. *Faldo*, *Cro. Jac.* 636. it has been lately determined, that bail to the original action, are not liable to the costs of a writ of error in the Exchequer Chamber.

Page 609. Bankrupt,—Costs, when a proveable debt.

Hurst v. Mead, B.R.T. 33G.3. 5 T. R. 365.

IF a plaintiff, after a nonsuit against him, but before the taxation of costs, become a bankrupt, the costs of the nonsuit are a debt, proveable under the commission; for the *taxation* of the costs was merely the ascertaining of the *amount* of the debt which existed previous to the bankruptcy.

So it should seem, that where a judgment obtained against a man *before* his bankruptcy is made the foundation of any proceedings *subsequent* to the bankruptcy, the costs of such subsequent proceedings relate back to the judgment, and may be proved under the commission.

Phillips v. Brown, B.R.P. 35 G. 3. 6 T. R. 282.

THUS where a commission of bankrupt issued against the defendant in 1782, on which he afterwards obtained his certificate —In *August*, 1787, the plaintiff brought an action against the defendant on the balance of accounts, and obtained an interlocutory judgment in *Michaelmas* Term following. On the nineteenth of *January*, 1788, a second commission of bankrupt issued against the defendant. On the thirty-first of the same month final judgment was signed by the plaintiff, on which a writ of error was brought. On the sixteenth of *June*, 1789, the defendant obtained his certificate under the second commission, but under this commission he did not pay fifteen shillings in the pound. On the thirtieth of *May*, 1790, the writ of error was non-prossed, and the costs of it taxed at forty pounds to the plaintiff. In *Trinity* Term, 1794, the plaintiff sued out a *scire facias* to revive the judgment, to which the defendant pleaded his certificate in bar; and issue having been joined on that, it was tried at the sittings after the last Term, when a verdict was given for the plaintiff for two hundred and sixty-nine pounds twelve shillings and five pence, and also for forty pounds for the costs in error; and the costs of the *scire facias* were taxed at thirty-six pounds to the plaintiff. On the second of *April*, 1795, the defendant's goods were taken in execution for the two hundred and sixty-nine pounds, and the forty pounds; and on the same day the defendant himself was taken in execution for the thirty-six pounds for the cost of the *scire facias*: but a friend of the defendant paid that sum to obtain his release till the opinion of this Court could be taken respecting the propriety of that arrest; to obtain which, a rule was granted, calling on the plaintiff to shew cause, why the sum of thirty-six pounds which

had been paid into the hands of the sheriff, should not be restored to the defendant, and why the defendant should not be discharged as to any future arrest on account of the same.

THE Court took time to consider of their opinion, which was now delivered by

LORD KENYON, *Chief Justice.*—We have looked into all the cases cited, and are clearly of opinion that the certificate delivers the defendant from the costs of the *scire facias* as as well as from the original judgment. It has been carried farther in practice, though I am not aware of any judicial determination upon the point, that where a writ of error is brought to reverse a judgment, which is frequently a dilatory proceeding, and which in many cases is reprehensible, yet, as it springs out of the original debt which is the substratum of the whole, the certificate which discharges the bankrupt from the original debt, also discharges him from the costs of prosecuting the writ of error. In the present case, the *scire facias* was sued out by the plaintiff to enable him to reap the fruits of his judgment; it was a step to lead to execution for his original demand, and the defendant being discharged as to the original judgment, we think that all the means that conduce to that end, must be considered as consequential upon, and included in, the original demand.

Rule absolute.

Ese J.G.

A TABLE

A TABLE OF THE NAMES OF THE CASES IN THE APPENDIX.

Addison v. Gray, 26
Adlem v. Grinaway, 10

Barker v. Hargreaves, 29
Barney v. Tubb, 17
Barton v. Etherington, 32
Blackburn v. Gregson, 23
Bolingbroke, Lord, v. Woodfall, 6
Booth v. Atherton, 25
Booth v. Holt, 22
Brock v. Richardson, 23
Brooke v. Willet, 15
Brooks v. Moravia, 20
Burchell v. Ballamy, 26

Carr v. Shaw, 27
Cawthorn v. Thompson, 17
Clarke v. Donovan, 30
Codron v. Hayman, 23
Comer v. Baker, 13
Cresswell v. Hoghton, 1

Doe v. Davis, 11

Evans, Gent. one, &c. v. Jones, 19
Emerson, one, &c. v. Lashley, 29
37

Fox v. Smith, 26

Ganesford v. Levy, 27
Goldthwaite and wife v. Petrie, 21
Greaves v. Warner, 5

Henschen v. Garves, 28
Hurst v. Mead, 41

Jonas v. Greening, 20
Jordaine v. Sharpe, 25

The King v. The Inhabitants of Chadderton, 35
——— v. The Inhabitants of Clifton, 35
——— v. Kettleworth, 35
——— v. Wallis, 36

Lee v. Hall, 34
Lickbarrow v. Mason, 24.
Lockwood v. Stannard, 6

Morland v. Lashley, 33

Phillips v. Brown, 41

Randle v. Fuller, 32
Read v. Dupper, 34
Redridge v. Palmer, 12
Reynold v. Edwards, 15

Savile v. Jardine, 5
Smith v. Edge, 7
Smith v. Hall. 24
Swinnerton v. Jervis, 15.

Thrustout ex Dim. Williams, v. Holdfast, 29

Vaughan v. Davies, 31

Webb v. Brown, 20
White, one, &c. v. Milner, 31